JURISPRUDENCE

BY

NOSHIRVAN H JHABVALA, B A , LL B

Advocate (O S) High Court Bombay

— *AUTHOR OF COMMENTARIES ON* —

Roman Law English Constitutional Law, The Government of India Act Indian Contract Act, Law of Torts, The Indian Penal Code, Criminal Procedure Code Hindu and Mahomedan Laws Indian Succession Act Elements of Equity (In press) Law Relating to Specific Relief and Trusts Evidence Act Civil Procedure Code Indian Limitation Act, The Transfer of Property Act; Indian Easements Act, Indian Registration Act Bombay Land Revenue Code and Land Tenures Indian Contract Act with the Sale of Goods Act Partnership Act The Negotiable Instruments Act and the Mercantile Law Presidency Towns Insolvency Act and the Provincial Insolvency Act

SECOND EDITION

Revised & Enlarged

1943

Printed by Ramdas I Patel Rajni Printery 149 Princess St Bombay
and Published by Jamnadas L Shah C Jamnadas & Co
Princess Street Bombay

PREFACE TO THE SECOND EDITION

I am deeply indebted to the following authors on Jurisprudence for the valuable assistance I have received in compiling this Edition,—Viz, Ahren, Austin, Bentham, Herbert Spencer Holland Lindley, Markby, Moyle, Phillip, Pollock, Pothier Salmond, Smith and Story

Chateau Marine
Marine Drive,
Bombay, 15th September 1913

NOSHIRVAN H JHABVALA

PART I

THE SCIENCE OF JURISPRUDENCE

CHAPTER I

NATURE AND SCOPE OF JURISPRUDENCE

'Jurisprudence' defined

The term Jurisprudence is used in three distinct senses—As being I the Science of *Law*, II the Science of *Civil* Law and III Theoretical or Analytical Jurisprudence

I Jurisprudence as the Science of LAW –

In the *widest* of its meanings, the term 'Jurisprudence' means *the science of law*, using the term '*law*' in that *vague and general sense*, in which it includes *all species of obligatory rules of human action*. Of Jurisprudence in this sense, there are at least *three* divisions —

1 Civil Jurisprudence —This is the science of *civil* law, i e the *law of the land* Its purpose is to give a complete and systematic account of the principles which are received and administered *in the tribunals of the state*

2 International Jurisprudence —This is the science of *international* law or the *law of nations* Just as the conduct of the subjects of a single state is governed by the *civil* law, so international law regulates the conduct of *states* themselves in their relations towards each other.

3 Natural Jurisprudence —This is the science of the law of *nature* By this is meant the principles of natural justice "justice as it is in itself, *in deed* and *in truth*, as contrasted with those more or less imperfect and distorted images of it which may be seen in civil and international law"

II Jurisprudence as the Science of CIVIL Law –

In a second and *narrower* sense, jurisprudence instead of including the above three divisions is limited to *civil* jurisprudence It is the science of *Civil* Law

NATURE AND SCOPE OF JURISPRUDENCE

Civil Jurisprudence is divisible into *three* branches — the *exposition* of the legal system as it now is

1 *Systematic* —It deals with the *present* its purpose is

2 *Historical*—It deals with the *past*, i e , with the legal system in the process of its *historical* development

3 *Critical* —It deals with the ideal *future* It expounds the law not as it *is* or has been but as it *ought* to be

The first is legal *exposition* the second is legal *history* the third is commonly known as the *science of legislation*

III Theretical (or Analytical) Jurisprudence —

What is mean by Analytical Jurisprudence?
B U Oct 1936

There is yet a *third* and still *narrower* sense in which Jurisprudence includes not the *whole* science of civil law, but only a particular *part* of it In this *limited* signification, it may be termed *abstract, theoretical analytical* or *general.* to distinguish it from the more concrete, practical and special departments of legal study It comprises those more *fundamental* conceptions and principles which serve as the *basis* of the concrete *details* of the law It comprises the *first principles of civil jurisprudence* in *all* its three divisions systematic historical and critical

Its Scope — Analytical' or Theoretical' Jurisprudence approximately deals with such matters as the following —

1 An *analysis* of (i) the conception of Civil Law (ii) and of legal rights together with the division of rights into various classes and the general theory of the creation transfer and extinction of rights

What subjects does Theoretical' or Analytical' Jurisprudence deal with?
B U Oct 1936

2 An *examination* of—(i) The relations between Civil Law and other forms of law (ii) Juridical conceptions which deserve *special attention e g* subjects like Property Possession Obligations Intention Motive, Negligence etc

3 An account of the *sources* from which the law proceeds

4 An investigation of the theory of legal liability, civil and criminal etc etc

Ethical Jurisprudence

There is yet a fourth kind of Jurisprudence It is *Ethical* Jurisprudence It is concerned not with the *exposition* or *history* of law but with the *purpose* and *end* of the law namely the maintenance of justice by means of the physical force of the state In other words it is concerned with the *theory of justice in its relation to law*

The following are the topics with which a book of ethical Jurisprudence may deal —

1 The conception of justice

2 The relation between law and justice

3 The manner in which law fulfils its purpose of maintaining justice

4 The distinction if any between the sphere of justice as the subject matter of law and those other branches of right which pertain to morals exclusively

5 The ethical significance and validity of those legal ideas and principles which are so fundamental in their nature as to be the proper subject matter of analytical jurisprudence

Purpose of Jurisprudence

It is essential for a lawyer in his practical work to have a knowledge of Jurisprudence, the aim of which is to formulate the fundamental principles which are adopted by society to adjust the relations between man and man, because a knowledge of the general ideas and principles lying at the root of all rules of law which Jurisprudance imparts, serves (i) to train the mind into legal ways of thought, and (ii) affords a key to the solution of many provisions of civil law which would otherwise appear to be singular and unaccountable

What is the purpose of prudence?

B U Apr

Without such knowledge, no lawyer, however practically eminent, can really measure the meaning of the assumptions upon which his subject rests

It has been aptly said that Jurisprudence is the eye of the law and this statement may be best illustrated by stating in short the main *uses* of Jurisprudence They are—

Jurisprudence the eye of the law Discuss this statement

B U Oct

(i) A study of those fundamental principles which are common to all systems of law is of great advantage in the study of a particular system of law

(ii) For the practical work of the legislator and the advocate a knowledge of the fundamental principles which are adopted by society to adjust the relations between man and man is absolutely essential The aim of jurisprudence is to formulate these principles 'to supply the foundations which the science of law demands but of which the art of law is careless

(iii) A study of jurisprudence has been of immense advantage in the closely allied science of legislation which concerns itself with what the law should be

CHAPTER II

THE NATURE AND SOURCES OF LAW

"Law" defined

Enumerate the different kinds of law in its most general and comprehensive sense and briefly analyse and distinguish them giving illustration
B U Oct 1937

In its *widest* sense the term 'law' includes *any rule of action*, that is to say, any standard or pattern to which actions (whether the acts of rational agents or the operations of nature) are or ought to be conformed

Blackstone says "Law in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational Thus, we say, the laws of gravitation, of optics of mechanics, as well as the laws of nature and of nations"

Distinguish between Law Laws a Law the Law
B U April 1936

Of law in this sense there are many kinds, but following are the chief forms —1 Imperative Law, 2 Physical or Scientific Law, 3 Natural or Moral Law 4 Conventional Law, 5 Customary Law, 6 Practical or Technical Law, 7 International Law or the Law of Nations, and 8 Civil Law or the Law of the State These are dealt with at their proper places below

'The' Law defined

The law is an ass they say Discuss this with reference to what is meant by 'The Law'
B U Oct 1933

The law is the body of principles recognised and applied by the state in the administration of justice Or, more shortly —*The law consists of the rules recognised and acted on in courts of Justice*

The Law consists of the rules recognised and acted on by Courts of Justice' Comment
B U April 1921 1934

The above is a definition not of *a* law but of *the* law The term "Law" is used in two senses which may be distinguished as the *abstract* and the *concrete* In the *abstract* application, we speak of the law of England, the law of libel and so forth In its *concrete* sense, we say that Parliament has enacted or repealed a law

The following are a few illustrations of the term the law—

State the exact significance of the term Law' in the following (1) The law of British India (b) Natural Law (c) International Law What is the sanction for the rules of law in each case?
B U Oct. 1925

(a) The law of British India—is the civil law, the law of the state or of the land the law of lawyers and the law courts of British India It is the body of rules observed in the administration of justice The physical power of the state in the administration of justice

(b) Natural Law—The term Law in this case means the principles of natural right or wrong the principles of natural justice as opposed to justice administered in the courts of the state Natural law was conceived by the Greeks as a body of imperative rules imposed upon mankind by nature Natural law has received many other names It is Divine Law the Command of God imposed upon men Natural law is also the law of of Reason It is also the Eternal Law

(c) International Law—or the law of Nations, is the body of rules which govern sovereign states in their relations and conduct towards each other War is the most formidable of the sanctions which in the society of nations maintains the law of nations

NOTE—Bentham remarks "Law or the Law, taken indefinitely, is an abstract or collective term, which when it means anything can mean neither more nor less than the sum total of a number of individual laws taken together" Salmond, however, does not accept Bentham's interpretation He is of opinion that the constituent elements of which law is made up are not laws but rules of law or legal principles That a will requires two witnesses is not rightly spoken of as law of England it is a rule of English law A law means a statute enactment, ordinance or other exercise of legislative authority It is one of the sources of law in the abstract sense it stands in the same relation to the law as a judicial precedent stands to case-law So *law and laws—the law and a law— are not identical in nature or scope*

Elucidate the following – "Law and laws, the law and a law are not identical in nature and scope"
B U Apr 1935

Territorial Nature of Law

"The law is conceived and spoken of as territorial But the territory to which a system of law is so attributed is not necessarily coincident with the territory of the state whose courts administer it or whose legislature makes it The territory of a legal system may be and very often is, only a portion of the territory of the state Thus the law of England and the law of Scotland are both the law of the same state but they are in force in different parts of it The territorial aspect and nature of the law therefore cannot be explained by saying that each system of law is attributed to the territory of that state by whose courts the law is recognised and administered"

Comment on—'The law is spoken of as territorial'
B U Apr 1931

KINDS OF LAW

1 General and Special law

Distinguish between 'General Law' and Special Law
B U Oct 1926
1930
Apr 1933
1936
Oct 1933
1938
Apr 1939

The whole body of legal rules is divisible into two parts which may be distinguished as general law and special law

General law consists of the general or *ordinary law of the land* Special law consists of certain *other* bodies of legal rules, which are so special and exceptional in their nature, sources, or application that it is convenient to treat them as standing outside the general and ordinary law, as derogating from or supplementing it in special cases but not forming a constituent part of it

General law consists of those legal rules of which the Courts will take *judicial notice* whenever there is occasion for their application. Special law, on the other hand, consists of those legal rules which, although they are true rules of law, the Courts *will not recognise and apply them as a matter of*

What is the test which Salmond applies?
B U Oct 1933

course, but which must be specially proved and brought to the notice of the Courts, by the parties interested in their recognition The test of the distinction is *judicial notice*

Judicial notice —By this is meant the knowledge, which any court, *ex officio*, possesses and acts on, as contrasted with the knowledge which a court is bound to acquire on the strength of evidence produced for the purpose

What do you understand by Judicial notice?
B U Oct 1930

Kinds of Special Law

What are the classes into which Special Law may be divided?
B U Oct 1930
Oct 1930
Apr 1933
Oct 1933
Oct 1938
Apr 1939

The rules of special law fall for the most part into seven distinct classes —

1 Local Customs —Immemorial custom in a particular locality has there the force of law It prevails over the general law of the land

2 Mercantile Customs —The second kind of special law consists of that body of mercantile usage which is known as the *law merchant*

Under what categories of law would you place the following? (i) The Statute and Ordinance of the Bombay University relating to the registration of graduats (ii) Rules under the Indian Army Act 1911 relating to the government of officers soldiers and other persons in His Majesty's Indian Forces (iii) The Workmen's Compensation Act VIII of 1923
B U April 1936

3 Private Legislation —Statutes are of two kinds distinguishable as public and private The distinguishing characteristic of a public Act is that judicial notice is taken of its existence A private Act on the other hand, is one which does not fall within the ordinary cognisance of the courts of justice and will not be applied by them unless specially called to their notice

Thus, examples of private legislation are acts incorporating individual companies acts regulating the navigation of a river or any other acts concerned with the interests of private individuals or particular localities The by laws of a railway company also fall under this head

4 Foreign Law It is essential in many cases to take account of a system of foreign law and to determine the rights and liabilities of litigants on its basis

5 Conventional law —A variety of special law has its source in the *agreement* of those who are subject to it Agreement is a law for those who make it

Write a short note on Autonomic Law
B U Oct 1939

6 Autonomic Law —It is that species of enacted law which has its source in various forms of subordinate legislative authority possessed by private persons and bodies of persons Thus Railway Company may make by laws for regulating its undertaking A University may make statutes for the government of its members

Martial Law, Martial law is the law applied to courts martial in the administration of *military* justice The army also exercises the function of administering justice The courts established within the army for this purpose are courts martial and the law is of three kinds, being either *(i)* the law for the discipline and government of the army *itself*; or *(ii)* the law by which the army in time of war governs *foreign territory* in its military occupation outside the realm, or *(iii)* the law by which in time of war the army governs the realm itself *in derogation of the civil law* The first form, also known as military law, is distinguished from the other two forms in the following three respects *(i)* it is in force both in time of peace and time of war, whereas the other forms are in force only in time of war, *(ii)* it applies to the army, while they to the civil population, *(iii)* it is of statutory authority, being contained in the Army Act, whereas they have their source in the royal prerogative

What is 'Martial Law'?
B U Apr 1931

Explain the term Military (as distinguished from Martial) Law
B U Apr 1929 Oct 1934

Distinguish between 'Military Law" and, 'Martial Law"
B U Oct 1932

2 Conventional Law

By this is meant any rule or system of rules *agreed* upon by persons for the regulation of their conduct towards each other Agreement is a law for the parties to it e g rules of a club Such rules are often enforced by the state and so in many cases conventional law is also civil law

Write a short note on Conventional Law
B U Oct 1939

3 Customary Law

By this is meant any rule of action which is *actually observed by men*, a law or rule which they have set for themselves, and to which they voluntarily conform their actions

4 Practical Law

It consists of the rules which guide us to the fulfilment of our purposes, e g the laws of *health* the laws of *style*, of *architecture*

5 International Law

It consists of those rules which govern *sovereign states in their relations and conduct towards each other* According to Salmond it is essentially a species of *conventional* law and has its source in *international agreement* It consists of those rules which sovereign states have *agreed* to observe in their dealings with each other

What is International Law?
B U April 1933 Oct 1935

The international agreement which thus makes international law is of two kinds, being either *express* or *implied* Express agreement is contained in treaties and conventions Implied agreement is evidenced chiefly by the *custom* or *practice*

What is according to Salmond the correct theory of International Law?
B U Oct 1921

Discuss fully how far International Law is Conventional Law
B U Apr 1933

of states In a *wide* sense, the whole of international law is conventional In a narrow sense, international law derived from express agreement is called the *Conventional law* of *nations*, that part which is based on implied agreement is called the *Customary law of nations*

International law according to Lord Birkenhead—'consists of rules" acknowledged by the general body of civilised independent States, to be binding upon them in their mutual relations"

Its nature

Writers are not unanimous in their analysis of the essential nature of the law of nations The various theories may be classified as follows —*(1)* That the law of nations is or at least includes a branch of *natural* law, namely the rules of natural justice as applicable to the relations of states *inter se* *(2)* That it is a kind of *customary* law namely the rules actually observed by states in their relations to each other *(3)* That it is a kind of *imperative* law, namely the rules enforced upon states by international opinion or by the threat or fear of war, and lastly (4) that it is a kind of *conventional* law

What are the various competing theories which seek to explain the essential nature of International Law?
B U Oct 1933
1935

Salmond says that the prevalent opinion accepts the *fourth* theory that the law of nations is a species of *conventional* law

6 Prize Law

What is Prize Law?
B U Apr 1930

'*Prize law*' is that portion of the law of nations which regulates the practice of the *capture* of ships and cargoes at sea *in time of war* It is the law as applied by courts called prize courts, in administering justice *as between the captors and all persons interested in the property seized*

Write a short critical and explanatory note on Prize Law
B U Oct 1932

Now a prize court is not an international tribunal, it is a court established by and belonging exclusively to the individual state by which the ships or cargoes have been taken Nevertheless the law which it is the duty and function of these courts to administer is the law of nations It has its source in the agreement of sovereign states among themselves

Discuss the view that Prize Law is international law and at the same time civil law
B U Apr 1933

Thus in short Prize Law, though a part of the international law, should be considered as also civil law *Prize Law has a two fold nature and aspect It is international law, because made by international agreement, and it is at the same time civil law, in the sense that it governs the administration of justice in civil Courts* This double aspect of Prize Law, was authoritatively established in the case of the Zamora (1916) during the Great War with Germany

7 Physical or Scientific Law

Physical laws are expressions of the uniformities of nature —general principles expressing the regularity and harmony in the operations of the universe

8 Natural or Moral Law

By this is meant the principles of natural right or wrong— the principles of natural justice

Right or justice is of two kinds *(a)* natural or moral justice, and *(b)* positive or legal justice Natural justice is justice as it is in *deed* and in *truth*—in its *perfect* idea Positive justice is justice as it is conceived, recognised and expressed more or less incompletely and inaccurately, by the civil or some other form of human and positive law Natural justice is the ideal and the truth, of which legal justice is the more or less imperfect realisation and expression Legal justice and natural justice represent two intersecting circles Justice may be legal but not natural or moral, or natural, but not legal, or both, legal *and* natural

Is there any difference between legal justice and natural justice and if so what?

B U Apr 1928
Oct 1937

Legal justice and natural justice represent intersecting circles Comment

B U Apr 1933

Natural Justice and Positive Morality

Natural justice is justice in deed and truth Positive morality means the rules of conduct approved by the public opinion of any community—the rules which are maintained and enforced in that community not by the civil law, but by the sanction of *public disapprobation* and censure

Define and distinguish between Natural Justice and Positive Morality

B U Apr 1932

9 Common Law

The term 'common law' is used by English lawyers in three diverse senses —

1 *'Common law' and 'Statute law'* — By the 'common law' is sometimes meant the whole of the law *except that which has its origin in statutes or* some other form of legislation It is the *unenacted* law that is produced by custom or precedent, as opposed to the enacted law made by Parliament or subordinate legislative authorities

Write a critical and explanatory note on—'Common Law'

B U Apr 1934

2 *'Common Law' and 'Equity'* — In another sense 'common law' means the whole of the law (enacted or unenacted) except that portion which was developed and administered by the old court of chancery, and which is distinguished as equity

3 *'Common Law' and 'Special Law'* —The common law is also used as a synonym for 'general law'

Law and Equity Until 1873, England presented the curious spectacle of two distinct and rival systems of law administered at the same time by different tribunals These systems were distinguished as 'comman law' and 'equity' or as 'law' and 'equity'

Define and distinguish between Law" and Euity
B U Apr 1932
Oc 1932

The common law was the older and was administered in the older courts namely the King's Bench, the Court of common Pleas, and the Exchequer Equity was the more modern body of legal doctrine developed by the Chancellor in the Court of Chancery as supplementary to, and corrective of, the older law

What changes were introdnced by the Judicature Act of 1873 in the law of England?
B U Oct 1930

To a large extent the two systems were harmonious In no small measure, however, law and equity were discordant, applying different rules to the same subject matter The same case was decided in one way, if brought before the court of King's Bench and in another if adjudged in chancery The Judicature Act of 1873 put an end to this state of things and the two systems were fused together

'Equity defined'

The term 'Equity' possesses at least three senses —(1) In the first sense it is nothing more than a synonym for *natural justice* *Aequitas is aequitas*

Explain fully the term Equity and discuss its peculiarities in English usage
B U Apr 1931
Oct. 1934

(2) In a second sense it means natural justice *as opposed to the rigour of inflexible rules of law*

(3) In a third sense it is no longer opposed to law, but is itself a particular kind of law *It is that body of law which is administered in the court of Chancery as contrasted with the body of law administered in the common law courts* Equity is chancery law as opposed to the common law The law developed in the Chancery Court was called 'equity' because it was in equity, justice, reason, good faith and good conscience—that it had its source

10 Imperative Law

What is Imperative law?
B U Oct. 1931
1939

Imperative Law means any rule of action imposed upon men by some authority which enforces obedience to it It is a command which obliges a person or persons to a course of conduct

Define 'Civil Law'
B U Apr 1937

Laws of this kind are to be classified with reference to the *authority* from which they proceed They are, in the first place, either *divine or human* Divine laws consist of the commands imposed by God upon men and enforced by threats of punishment in this world or in the next Human laws consist of imperative rules imposed upon men They are of three kinds —

(*a*) *Civil Law* —which mainly consists of commands issued by the state to its subjects, and enforced by its physical power

1698
2141209

(*b*) *The Law of Positive Morality* — which consists of the rules imposed by society upon its members and enforced by public censure or disapprobation

(*c*) *The Law of Nations or International Law* — which ordinarily consists of rules imposed upon states by the society of states, and enforced partly by international opinion and partly by threat of war.

VIIB

Imperative theory of Civil Law

Describe briefly the Imperative theory of Civil Law
B U Oct 1923, 1924, Apr 1930, Oct 1933, Apr 1937, Oct 1939, 1940

Many writers are content to classify the civil law as being essentially and throughout its whole compass, nothing more than a particular form of imperative law They consider that it is a sufficient analysis and definition of civil law, to say that it consists of the commands issued by the state to its subjects, and enforced, if necessary, by the physical power of the state This may be termed the *Imperative Theory of Civil Law*

'It is men and arms that make the force and power of laws" Comment upon this remark of Hobbes and examine the theory of law which it suggests
B U Mar 1920, Apr 1934

This imperative theory does undoubtedly express a very important aspect of the truth *It rightly emphasises the central fact that law is based on physical force* For, law exists only as an incident of the administration of justice by the state, and this consists essentially in the imperative and coercive action of the state in imposing its will, by force if need be, upon the members of the body politic, In the words of Hobbes, "It is men and arms that make the force and power of laws"

State and criticise Salmond's view of this theory
B U, Oct 1924

A historical argument against the imperative theory is urged to the effect that it is quite inapplicable to more *primitive* communities It is said that early law is not the command of the state it has its source in custom, religion, opinion not in any authority vested in a political superior

What is the criticism to which it (i e Imperative Theory of Civil Law) is subject?
B U Apr 1930, 1937

Law, therefore, (they say) is prior to, and *independent* of political authority It is enforced by the state because it is already law and not *vice versa*

How is that criticism met?

B U Apr 1930 1937

To this argument the advocates of the imperative theory can give a valid reply If there are any rules prior to, and independent of, the state, they may greatly *resemble* law, they may by the historical *source* from which law is developed and proceeds, but *they are not themselves law*

State and criticise Salmond's view of the Imperative Theory of Civil Law

B U Oct 1924

Salmond says that the plausibility of the historical argument proceeds from the failure adequately to comprehend the distinction between the formal and the material sources of law Its formal source is that from which it obtains the nature and force of law Its material sources are those from which it derives its material contents, e g custom and religion

"Law is not right alone or might alone but the perfect union of the two It is justice speaking to men by the voice of the state" Explain and discuss the above statement

B U Oct 1932

Yet although the imperative theory contains this element of the truth it is not the whole truth It is one sided and inadequate *It eliminates from the implication of the term 'law' all elements save that of force* The complete idea of the term contains at least one other element (viz the *ethical*) which is equally essential and permanent, viz *right* or *justice* If rules of law are commands issued by the state to its subjects they appear as the principles of right and wrong recognised and enforced by the state in administering justice Law is not right alone, or might alone, but the perfect union of the two It is justice speaking to men by the voice of the state The *established law may be far from corresponding accurately with* the true rule of right Nevertheless in *idea*, law and justice are coincident It is for the realisation of justice that the law has been created A purely imperative theory therefore, is as one sided as a purely ethical or non imperative theory would be It mistakes a part of the connotation of the term for the whole of it

Law is a growth from small beginnings The development of a legal system consists in the progressive substitution of rigid pre-established principles for individual judgement and to a large extent these principles grow up spontaneously within the tribunals themselves That great aggregate of rules which constitutes a developed legal system is not a condition precedent of the administration of justice but a product of it Gradually, from various sources—precedent custom statute—there is collected a body of fixed principles which the Courts apply to the exclusion of their private judgment

That it is on the whole expedient that Courts of Justice should thus become Courts of Law no one can seriously doubt. Yet the elements of evil involved in the transformation are too obvious and serious ever to have escaped recognition. *Laws are in theory* as Hooker says, *'the voices of right reason, they are in theory the utterances of Justice speaking to men by the mouth of state but too often in reality they fall short of this ideal. Too often they 'turn judgment to wormwood' and make the administration of justice a reproach.'* Nor is this true merely of the earlier and ruder stages of legal development. At the present day our law has learnt, in a measure never before attained, to speak the language of sound reason and good sense, but it still retains in no slight degree the vices of its youth; nor is it to be expected that at any time we shall altogether escape from the perennial conflict between law and justice. It is needful, therefore, that the law should prove the ground and justification of its existence.

Laws are in theory the voices of right reason they are in theary the utterances of Justice speaking to men by the mouth of the State, but too often they turn judgement to worm wood and make the administration of justice a reproach" —Comment upon this

B U Oct 1935

The authority of law

All judges, whether of inferior or of superior courts, *are under a moral obligation to observe the law*. The observance of this moral obligation is secured and endorsed by the pressure of public opinion, especially of that of the bar. Moreover, the wilful refusal of a judge to apply the established law, would amount to misconduct in his office, for which he could rightly be removed by the proper executive authority.

What do you mean by authority of law?"

B U Oct 1932

Now so far as *the judges of inferior courts* are concerned they *are also under a legal obligation to observe the law* and the observances of this legal obligation is enforced upon them by the superior courts by reversing their decisions, which are not in accordance with law and by substituting correct judgments in their place. Moreover, if the lower court refuses to exercise its lawful jurisdiction or claims to exercise a jurisdiction not conferred on it by law, the superintending jurisdiction of a higher court may be used to compel observance of the law.

Discuss the nature of the obligation of courts to administer justice according to law

B U Mar 1921
Apr 1929
1935

But *in the case of a superior court of judicature* (i.e. a court which is *not* subject to the appellate or supervising authority of any other court) such a legal obligation is merely moral because there is no other court in which any such obligation could be recognised or enforced. The duty of the final tribunal to observe law must be recognised as a moral obligation merely.

Is there a legal obligation on judges to administer justice according to law? If such obligation exists, is it enforced by any form of proceeding?

CHAPTER III
CIVIL LAW

Sanction

What is "Sanction"?
B U Oct, 1923
Apr 1925
1933
1935

The instrument of coercion employed by any regulative system is called 'a sanction,' and any rule of right supported by such means is said to be 'sanctioned'

(1) *Physical force* is the sanction applied by the *state* in the administration of justice

Define sanction" State and compare the different kinds of sanction Explain the different forms of sanction that are applied by the state in the administration of civil and criminal justice
B U Apr 1925
1933
1935
Oct 1949

(2) *Censure, ridicule and contempt* are the sanctions by which *society* enforces the rules of *positive morality*

(3) *War* is the last and most formidable of the sanctions which, in the *society of nations*, maintains the law of *nations*

(4) *Threatening of evils to* flow here or hereafter from divine anger are the sanctions of *religion*

Its forms

Explain why 'Sanction' assumes different forms in the administration of civil and Criminal justice
B U Apr 1925
1932

The administration of justice is the application by the state of the sanction of force to the rule of right We have now to notice that it is divisible into two parts which are distinguished as the administration of *civil* and that of *criminal* justice Both in civil and criminal proceedings there is a wrong complained of, yet the complaint is of an essentially different character in civil and criminal cases In *civil justice* it amounts to a *claim of right*, in criminal justice it amounts merely to an *accusation of wrong* The former consists in the *enforcement* of right, the latter in the *punishment* of wrong Hence it is that sanction assumes different forms in these two cases

Place of Law in the Administration of Justice

Discuss briefly the place of Law in the Administration of Justice
B U Mar 1923

The place of Law in the administration of justice is only secondary The primary purpose of the administration of the justice is the *maintenance of right or justice within a political community by means of the physical force of the state*, and through the instrumentality of the State's judicial tribunals *Law is secondary* and *unessential*

The administration of justice is defined as the maintenance of right or justice within a political community by means of the physical force of the state Law, as has been observed above, is secondary and unessential

"Justice becomes increasingly justice according to Law and Courts of justice

Now even when a system of law exists, the extent of it may vary Law is a gradual growth from small beginnings The development of a legal system consists in the progressive substitution of rigid pre established principles for individual judg

ment and to a large extent these principles grow up spontaneously within the tribunals themselves That great aggregate of rules which constitutes a developed legal system is not a condition precedent of the administration of legal system but a *product* of it In course of time, justice becomes justice according to law and courts of justice become courts of law The result is that the free discretion of a judge in doing right is excluded by pre determined rules of law ''

become increasingly courts of law'' Explain and comment on this proposition

B U Mar 1923
Apr 1932

What do you understand by "Justice according to Law"

B U Oct. 1937
Apr 1943

'Law' and 'Fact'

Judicial action is divisible into two provinces one being that of *law* and the other that of *fact* All matters that come for consideration before courts of justice are either matters of *law* or matters of *fact* The former are those falling within the spehere of pre established and authoritative principle, while the latter are those which the court must answer and determine in accordance with its own individual judgment

Discuss briefly= Questions of fact' and 'Questions of law' B U Apr 1929, 1930, 1932 1934, Oct 1936

The term Question of fact' has more than one meaning In its most general sense it includes all questions which are not questions of law

It is commonly said that 'all matters that come for consideration before courts of justice are either matters of law or matters of fact ' Examine this statement

B U Apr 1935
1938

There is, however a *narrower* and more specific sense in which the expression 'question of fact' does not include *all* questions that are questions of law, but only *some* of them In this sense a question of fact is opposed to a question of *judicial discretion* A question of judicial discretion is a question of what *ought* to be as opposed to a question of what is

In how many different senses is the expression 'Question of fact' used?

B U Apr 1930

A question is very often both one of fact and one of law, and is then said to be a *mixed* question of law and fact

As the legal system develops, it tends to transform questions of fact and of judicial discretion into questions of law by laying down fixed answers of these questions

Explain fully how with the development of a legal system, questions of fact' are transformed into 'questions of law''

B U Oct. 1932

As to questions of judicial discretion, the purpose and effect of a legal system is to exclude and supersede to a large extent the individual moral judgment of the Courts, and to compel them to determine these questions in accordance with fixed and authoritative principles which express the established and permanent moral judgment of the community at large

Legal principles in theory and in fact

In many cases actual facts and the view which law takes of them vary Thus, fraud in law is very often *not* the same thing as fraud in fact Law is often concerned with the *theory* of

Explain and discuss the following giving illustrations The eye of the law does not infallibly see things as they are Partly by deliberate design and partly by the errors

and accidents of historical development, law and fact legal theory and the truth of things, may fail in complete coincidence"

B U Oct 1926
Apr 1929

things and this theory may or may not conform to the reality of things outside the courts of Justice In many cases the eye of the law does not infallibly see things as they are The law, if it is to be an efficient and workable system, must needs be blind to many things, and the legal theory of things must be simpler than the reality Partly by deliberate design, therefore, and partly by the errors and accidents of historical development, law and fact legal theory and the truth of things, are far from complete coincidence That which is considered right or reasonable by the law may be far from possessing these qualities in truth and fact Legal justice may conflict with natural justice, a legal wrong may not be also a moral wrong, nor a legal duty a moral duty

Uses or advantages of Law

What are the chief uses of law?

B U Oct. 1930

The chief uses of law are three in number—

1 Uniformity and certainty

It imparts uniformity and certainty to the administration of justice It is often more important that a rule should be definite, certain known, and permanent, than that it should be ideally just

Discuss the advantages to be derived from the individual judgment by fixed principles of the law

B U Oct. 1925

It is better to have defective rules than to have none at all

2 Protection against Improper Motives of judges

Discuss and comment on the following dictum of Salmond The law is not always wise but on the whole and in the long run it is wiser than those who administer it"

B U Apr 1929

The necessity of conforming to publicly declared principles protects the administration of justice from the disturbing influence of improper motives on the part of those entrusted with judicial functions Hence the administration of justice according to law is rightly to be regarded as one of the first principles of political liberty So, in the words of Cicero 'We are the slaves of the law that we may be free"

3 Impartiality

What do you understand by the saying of Aristotle "To seek to be wiser than the lawgiver the very thing which is by good laws forbidden"

B. U Apr 1927

The law is necessarily impartial It is made for no individual case and for no particular man and so admits of no respect of persons

4 Freedom from Errors of Individual Judgment

The law serves to protect the administration of justice from the errors of individual judgment The problems

offered for judicial decision are often dark and difficult and there is a great need of guidance from that experience and wisdom of world at large, of which the law is the record The law is not always wise, but on the whole and in the long run it is wiser than those who administer it Hence the saying of Aristotle— *To seek to be wiser than the laws is the very thing which is by good laws forbidden*

Defects, vices or disadvantages of the Law

The law has evils of its own The following are the *four* defects of the law

Elucidate and illustrate the following "If the benefits of law are great, the evils of too much law are not small"
B U Apr 1934

1. Rigidity

Legal principles are to be applied to all cases without any allowance for exceptional circumstances This often works hardship and moral injustice

Discuss the defects incidental to a fixed legal system
B U Oct 1925

2. Conservatism

Law often fails to conform itself with the changes in circumstances and in men's views of truth and justice which are inevitably brought about by the lapse of time It is, in short, very conservative in its nature unless the help of legislation is sought

Explain that the law has its own uses and has its own defects
B U Oct 1930
1933

3 Formalism

Law often has a tendency to attribute undue importance to form as opposed to substance

4 Complexity

Often the law has a tendency to *complexity* Legal theories are often not simple or their language which is often elaborate In the nature of things, a very considerable degree of elaboration is inevitable

The law is without doubt a remedy for greater evils yet it brings with it evils of its own comment
B L Oct. 1936

Discretionary justice and legal justice

By *discretionary justice* is meant that kind of justice according to which right is done to all kinds of people in such fashion as commends itself to the unfettered discretion of the judge

State the merits and demerits of discretionary justice as

compared with justice according to law

B L Apr 1927
1943

By '*justice according to law*' we mean that kind of dispensation of right in which judicial tribunals are guided by a certain set of fixed authoritative rules to the exclusion of their own free will and discretion The law which is nothing but the wisdom and justice of the organised commonwealth, excludes personal discretion and opinion on the part of the judges Even where a system or law exists the total exclusion of judicial descretion by legal principles is impossible

Consider the advantages and disadvantages of administering justice according to law

B L Mar 1921
Oct. 1929
Apr 1943

The chief advantages to be derived from the exclusion of individual judgment (discretionary justice) by fixed principles of law are *four* in number They are (1) Uniformity and certainty , (2) Protection against improper motives of judges, (3) Impartiality , (4) Freedom from errors of individual judgment *(These have already been discussed above)*

PART II

JURISTIC CONCEPTS OF LAW AND JUSTICE

PART II

BASIC CONCEPTS OF LAW AND JUSTICE

CHAPTER I

THE ADMINISTRATION OF JUSTICE

Definition

Civil law is defined as "*the body of rules recognised and applied by the State in the administration of justice*" By the administration of justice is meant the maintenance of right within a political community by means of the physical force of the State

Define — The Administration of Justice' Discuss the necessity of it

B U Apr 1932

"*The administration of justice by the State must be regarded as a permanent and essential element of civilisation, and as a device that admits of no substitute*" Men being what they are, their conflicting interests, real or apparent, drive them in diverse ways and their passions prompt them to the maintenance of these interests by all methods possible It is true that in a perfectly civilised society this public physical force may never be called into actual exercise, but this marks, not the disappearance of governmental control, but the final triumph and supremacy of it

Explain and comment The administration of justice by the state must be regarded as a permanent and essential element of civilisation and as a device that admits of no substitutes"

B U Apr 1925

'A herd of wolves," it has been said, "is quiter and more at one than so many men, unless they all had one reason in them' or have one power over them" Unfortunately they have not one reason in them, each being moved by his own interests and passions Hobbs insists that the other alternative is the sole resource Man is by nature a fighting animal, and force is the *ultima ratio*, not of kings alone, but of all mankind Without "a common power to keep them all in awe" it is impossible for men to cohere in any but the most primitive forms of society Without it, civilisation is unattainable, injustice is unchecked and triumphant, and the life of man is, says Hobbes, "solitary, poor, nasty, brutish, and short" Bentham

Comment upon — A herd of wolves is quieter and more of one than so many men unless they all had one reason in hem or have one power over them"

B U Oct 1927

Comment briefly on the following — 'Those who persuade themselves that a multitude of men can be induced to live by the Rule of Reason are dreamers of dreams and of the golden age of poets"=Spino a

B U Oct 1925

Its origin and growth

The means adopted by the members of a social group to maintain justice have differed in the different stages of social evolution There seem to be *three distinct epochs* in which the successive instrument of justice has been They are—

Examine the following statement — The means adopted by the members of a social group to maintain justice have differed in the different stage social evolut

B U A

1 —Violent self help and personal vengeance

Trace briefly the origin of the administration of justice
B U Oct 1928
Apr 1932

2 —Social force

3 —State force

"In the beginning man redressed his wrongs by his hand aided, if need be, by the hands of his friends kinsmen At the present day, he is defended by the swor the *state* "

Law of Nature

In the civil state, the law of nature is supplemented by the civil One of the most important elements, then in the transition from the n to the civil state is the substitution of the force of the incorporrte comm for the force of individual as the instrument of the redress and punish of injuries The substitution was effected with difficulty and by slow de The administration of justice was in the earliest stages of its develop merely a choice of peaceable arbitration offered for the voluntary accep of the parties, rather than a compulsory substitute for self help and pi war At last the state intervened and suppressed the old system and saw all quarrels shall be brought for settlement to the courts of law Thus w the establishment of the modern theory of the exclusive administrati justice by the tribunals of the state

In what different meanings is the term 'law of nature'' used? Whether and if so how far has the law of nature influenced the nature of law?
B U Apr 1937

Kinds of Justice

Administration of justice is divisible into two pa Administration of *Civil* and *Criminal* justice In administe justice the tribunals of the state may either *enforce ri* or *punish wrongs* In other words, they either *compel* a r to *do* his duty or *punish* him for having *failed* to perform In a civil proceeding, the plaintiff *claims a right,* and court secures it for him by putting pressure upon the defend to that end In a criminal proceeding, the prosecutor cla no *right* but *accuses* the defendant of a *wrong* He is n *claimant* but an *accuser*

Define and distinguish between Civil and Criminal proceedings
B U Oct 1937

Both in civil and criminal proceedings there is a wrong complained Yet the complaint is of an essentially *different character* in both In justice it amounts to a *claim* of *right* in criminal justice it amounts me to an *accusation* of *wrong* Civil justice is concerned primarily with *plaintiff* and his *rights* criminal justice with the *defendant* and his *offe* The former gives to the plaintiff the latter to the defendant that w he deserves

State why and how far it may be that Civil Justice is the enforcement of rights while Criminal Justice is the punishment of wrongs
B. U Apr 1929

Private and public wrongs

Explain and discuss the following

By many persons the distinction between crimes and ci injuries is wrongly identified with that between public a

private wrongs By *a public* wrong is meant an offence committed against the *state* or the *community at large*, and dealt with in a proceeding to which *the state is itself a party* A *private* wrong is one committed against a *private person* and dealt with *at the suit of the individual so injured* But this view is not correct In the first place *all public wrongs are not crimes* Thus a refusal to pay taxes is wrong against the state but it is a civil wrong just as a refusal to pay money lent by a private person is a civil wrong Secondly *all crimes are not public wrongs* Most of the numerous offences may be prosecuted in a proceeding instituted by a private person Yet the proceeding is criminal none the less

giving illustration Wrongs are divisible into two orts of species private wrongs or public wrongs"

B U Oct 1926

'The distinction between criminal and civil wrongs is based not on any difference in the nature of the remedy applied' Comment upon this and explain its implications

B U Oct 1934

According to Salmond *the divisions between public and private wrongs and between crimes and civil injuries are not coincident but cross divisions* 'Public rights are often enforced and private wrongs are often punished *The distinction between crimes and civil injuries is based not on any difference in the nature of the right infringed, or in the public or private nature of the proceeding taken in respect of the violation, but on the difference in the nature of the remedy applied*" The remedy in the case of civil injury is *enforcement of the plaintiff's right* in the case of a crime *punishment* of the wrongdoer Civil justice is concerned primarily with the plaintiff and his rights criminal justice with the accused and his offences

The divisions between public and private wrongs and between crimes and civil injuries are not coincident but cross divisions" Comment

B U Oct 1927

11698
24/2001

Private and public justice

When we consider justice in its *special* aspect as administered and maintained by the tribunals of the state it becomes manifest that it is of two kinds Justice is either private or public The former is a relation between individual persons—between man and man—while the latter is a relation between individual persons and a court of justice Private justice is that which the courts are appointed to maintain or enforce public justice is that which they are appointed to administer and dispense Public justice is that which a plaintiff demands and receives from a judicial tribunal because he has a right to obtain private justice from his antagonist Private justice is the end for the sake of which the courts exist public justice is the *instrument* by which they fulfil their functions It is public justice, not private justice, which wears the sword and the scales

English clearly distinguishes private and public justice

P L Apte

Public justice is of two kinds being either criminal or civil justice Criminal justice is retributive whereas civil justice is remedial Criminal justice gives to a wrongdoer what he deserves for his infraction of the rule of private justice

a person who has been injured by a violation of private justice what he deserves by way of restitution or redress from him who has so injured him

State the objects of punishment in the administration of criminal justice What should in your opinion be the real object of such punishment?

B U Oct 1929
Apr 1932
Oct 1936
1937
1938
Apr 1939

Objects of punishment in criminal trials

Purposes of punishment are four viz 1 Deterrent 2 Preventive 3 Reformative and 4 Retributive

1 Deterrent punishment

Explain in brief the deterrent purpose of punishment

B U Oct 1926

Punishment is primarily deterrent—Its object is to deter persons in general by fear by making the offender an example and warning to all

This deterrent method is now generally regarded as the most fruitful method of suppressing crime while preventive and reformative methods can only operate upon the criminal himself

2. Preventive punishment

Explain in brief the preventive purpose of punishment

B U Oct 1936

Punishment is in the second place, *preventive* or *disabling* Its primary purpose being to *deter* by fear, its secondary purpose is to *prevent* a repetition of wrongdoing by the *disablement* of the wrongdoer

Capital punishment

Discuss the utility or futility of death sentence as a punishment also discuss what the result will be if death sentence can be awarded for all offences

B U Oct 1926

The authors of the Indian Penal Code say "We are convinced that it ought to be very sparingly inflicted and we propose to employ it only in cases where either murder or the highest offence against the state (S 121) has been committed" For if death sentence were to be awarded even for petty offences no doubt it would deter men from committing those offences but it will not serve as an inducement to stop short at the less serious crime when committed it will be on the other hand, a strong motive to follow up his crime with murder The principal object of punishment will thus be frustrated

Punishments under the I P Code

The punishments to which the offenders are liable under the provisions of the Indian Penal Code are (1) Death (2) Transportation (3) Penal Servitude (4) Imprisonment (5) Forfeiture of property, (6) Fine

(1) *Death*—The authors of the Code say We are convinced that it ought to be very sparingly inflicted and we propose to employ it only in

cases where either murder or the highest offence against the state (S 121) has been committeed" For if death sentence were to be awarded even for petty offences no doubt it would deter men from committing those offences but it will not serve as an inducement to stop short at the less serious crime when committed, it will be, on the *other hand a strong motive to follow up his* crime with murder The principal object of punishment will thus be frustrated

Discuss briefly aspects of each the punishments prescribed under the Indian Penal Code except those of fine and penal servitude

B U Oct 1926

(2) *Transportation*—The pain which is caused by punishment is unmixed evil It is by the terror which it inspires that it produces good and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportion in this country (India) Prolonged imprisonment may be more painful in the actual endurance, but it is not dreaded so much beforehand nor does a sentence of imprisonment strike either the offender or the by stander with so much horror as a sentence of exile beyond what they call the Black Water The separation resembles that which takes place at the moment of death

(3) *Imprisonment*—Imprisonment is of two kinds rigorous and simple In the case of rigorous imprisonment the offender is put to hard labour such as grinding corn digging earth etc In the case of simple imprisonment the offender is confined to jail and is not put to any kind of work

(4) *Forfeiture*—Absolute forfeiture of property was a punishment inflicted on persons guilty of high political offences and offences punishable with death It has now been abolished by Act XVI of 1921

Forfeiture of specific property is still retained as a punishment in some cases See S 126 127 and 169 I P Code

8 Reformative punishment

Punishment is in the third place reformative It aims at *reforming* the individual rather than punishing him "Offences are committeed through the influence of motives upon character, and may be prevented either by a change of motives or by a change of character Punishment as deterrent has the former effect as reformative, it has the latter"

Examine fully the objects of the different kinds of punishments as ends of criminal justice with special reference to the Reformatory Theory of Punishment.

B U Oct. 1939

There is a necessary conflict between the deterrent and the reformative theories of punishment The purely reformative theory admits only such forms of punishment as are *subservient to the education and discipline of the criminal*, and rejects all those which are profitable as deterrent or disabling Application of this reformative method demands that prisons should be turned into comfortable dwelling houses with libraries playing fields, and other educative facilities in order that physical and

mental rejuvenation of the inmates may take place Infliction of death penalty is in this view merely a confession of failure, and flogging a barbarous relic of bygone times The *deterrent* theory, on the other hand, demands that prisons should be *as unpleasant as is consistent with humanity* in order that criminal classes may feel a dread of incarceration therein while death and flogging are to be retained as valuable deterrents in certain cases

Write a short explanatory note on Reformative Punishment

B L Apr 1934

Theory of reformative punishment

According to the view of the advocates of the reformative theory imprisonment is the only important instrument available for the purpose of a purely reformative system

Its criticism

Discuss and criticise the Reformative theory of punishment What, according to you, should be just and rational system of criminal justice?

B U Apr 1943

But in view of the moral standard of the existing societies, the application of the purely reformative theory would lead to astonishing and inadmissible results If criminals are sent to a prison in order to be there transformed into good citizens by physical intellectual, and moral training prisons must be turned into dwelling places far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn

Again in the case of *incorrigible offenders* the logical inference from this theory is that they should be abandoned in despair as not fit subjects for penal discipline

A Modern theory considered

A political party in the State proposes to deliver the criminals out of the hands of men of law into those of men of medicine State the arguments that can be advanced for and against this view giving your opinion in the matter

B U Apr 1927

According to the new science of criminal anthropology, crime is identified with some *mental disease* and therefore criminals should be delivered out of the hands of men of law into the hands of men of medicine To a very large extent criminals are not normal and healthy human beings crime is the product of physical and mental abnormality and degeneracy therefore it is desirable that they should be medically examined first and if they are found not to be abnormal or insane but ordinary types of human beings, they might be dealt with by the law and awarded proper punishment

What is the correct theory ?

The perfect system of criminal justice is based on neither the reformative nor the deterrent principle exclusively, but is the result of a compromise between them In this compromise it is the *deterrent* principle which possesses *predominant* influence

Consider the importance of curative punishment in the administration of criminal justice What according to you should be the object of punishment in dealing with (i) Juveniles (ii) Old Offenders and (iii) Abnormals ?

B U Apr 1936

In the case of juvenile offenders reformative punishment may be rightly given as there are greater chances of improvement than in the case of adults In the case of habitual and incorrigible offenders, deterrent punishment alone should be awarded, as it alone will serve a warning and an example to others

4 Retributive punishment

It is that which serves for the satisfaction of emotion of retributive indignation which in all healthy communities is stirred up by injustice It gratifies the instinct of revenge or retaliation, which exists not merely in the individual wronged, but also by way of sympathetic extension, in the society at large

Write a short note on Retributive Punishment

B U Oct 1935
Apr 1938

'Salmond's Theory of Expiation'

A more definite form of the idea of purely retributive punishment is that of '*expiation*' In this view crime is blotted out or 'expiated' by the suffering of its appointed penalty To suffer punishment is to pay debt due to the law that has been violated The wrong-doer has by transgressing the law of right incurred a debt Justice requires that the debt be paid and that the wrong be expiated The penalty of wrong-doing is a debt which the offender owes to his victim and when the punishment has been endured, the debt is paid innocence is substituted for guilt and the *vinculum juris* forged by crime is dissolved Hence the remark of Salmond– *guilt plus punishment is equal to innocence'*

Guilt plus punishment is equal to innocence' Comment

B U Oct 1937

Primary and sanctioning rights

The object of civil proceedings is the enforcement of the plaintiff's right The right so enforced is called Primary or *Sanctioning*

'A sanctioning right is one *which arises* for the enforcement of *another right* All *others* are primary

Write a short critical note on Sanctioning Rights
B U Oct 1934

have *some other source than wrong*" If A enters into a contract with B A's right to have the contract fulfilled is *primary* right if this contract is broken his right to damages for this breach is a *sanctioning* right

Kinds of sanctioning rights

Comment that Sanctioning rights are of two kinds
L U Oct 1931

The purpose of sanctioning rights is divisible into (1) *penal action* i e the imposition of a pecuniary *penalty* upon the defendant for the wrong which he has *committed* or (2) *Restitution and Penal Redress* i e the grant of pecuniary *compensation* for the plaintiff in respect of the *damage* which he has suffered from the defendant's wrong doing We shall deal with the two kinds in detail

1 Penal Action

What is a penal action?
B U Apr 1934

The law often creates and enforces a sanctioning right which has in it *no element of compensation* to the person injured but is appointed solely as a *punishment* for the wrong doer

Such an action is called a *penal action* as being brought for the recovery of a *penalty* But it is none the less a purely *civil* proceeding and not a criminal proceeding

2 Restitution and Penal Redress

Distinguish Restitution from Penal redress
B U Oct 1937

The second form of sanctioning right is the right to pecuniary compensation or damages Such compensation is divided into two kinds which may be distinguished as *Restitution* and *Penal Redress* In *restitution* the defendant is compelled to give up the pecuniary *value* of some benefit which he has wrongfully obtained at the expense of the plaintiff *Penal redress* on the other hand is a much more common and important form of legal remedy than mere restitution

Liability of a dead person

A defames B Before B can sue A dies Has B any remedy?
B. U Oct 19_3

According to common law a man cannot be punished in his grave therefore it was held that all actions for penal redress should be brought against the living offender and must die with him *Actio personales moriuntur cum persona* The old rule has in great part been abrogated by various statutory provisions but it is the same in respect of personal injuries such as assault or defamation Thus A defames B Before B can sue A A dies

B in law has no remedy against A But the modern opinion is that there is no sufficient reason for drawing any distinction in point of survival between the right of a creditor to recover his debt and the right of a man who has been injured by assault or defamation to recover compensation According to it the liability once originated creates a valuable right in the person wronged

'Penal' and 'Remedial' liability

Legal proceedings may be divided into five classes, namely —1 Actions for specific enforcement, 2 Actions for restitution 3 Actions for penal redress, 4 Penal actions, and 5 Criminal prosecutions

Define and distinguish between Penal and Remedial proceedings Give Illustrations to elucidate your answer

B U Oct 1925
1931
Apr 1932
1934
Oct 1936

It may be observed that the last three of these contain a common element which is absent from the others, namely the idea of punishment All these three proceedings, therefore, may be classed together as *penal*, and as the sources of *penal liability* The other forms, namely specific enforcement and restitution, contain no such penal element and they may be classed together as *remedial* and as the sources of *remedial liability*

Penal proceedings, therefore, may be defined as *those in which the object of the law, immediate or ulterior, is or includes the punishment of the defendants* All others are *remedial*, the purpose of the law being nothing more than the *enforcement* of the plaintiff's *right*

Secondary Functions of Courts of Law

State briefly the primary and secondary function of courts of law

B U Oct 1921
Apr 1928

The primary function of a court of law as we have already seen above, is the administration of justice viz the application by the state of the sanction of physical force to the rules of justice

It is to administer justice that the tribunals of the state are established But there are four secondary functions which the Courts perform They are—

1 Petition of Right

If a subject claims that a debt is due to him from the Crown or that the Crown has broken a contract or

Explain what is meant by Petition of Right

B U Oct 1930
Apr 1938

wrongfully detains his property, he is at liberty to take proceedings by way of petition of right in a court of law for the determination of his rights and the claim will be duly investigated by the court and decision pronounced on merits of the case just as in an action between two *private* persons. But this is *not the administration of justice strictly* and properly so called for *the essential element of coercive force is lacking*. The state is the judge in its own cause, and cannot exercise constraint against itself.

2 Declaration of Right

Briefly discuss the secondary functions of court of law

I U Apr 1928
1932
1936
Oct 1938

A litigant may claim the assistance of a Court of law not because his rights are *violated* but because they are *uncertain*. What he desires is not their *enforcement* against another person but a *declaration that they exist*. Examples of declaratory proceedings are declarations of legitimacy, and the authoritative interpretation of wills.

3 Administration

Courts of justice sometimes undertake the *management* and *distribution* of property. Examples are the administration of a trust, the liquidation of a company.

4 Titles of Right

These are all those cases in which judicial decrees are *employed as the means of creating, transferring and extinguishing rights*, e g , an adjudication of bankruptcy, a grant of letters of administration *etc*.

CHAPTER II

THE SOURCES OF LAW

Two sources of Law

These are—1 Formal and 2 Material 'A formal source is that from which a rule of law derives its *force* and *validity* It is that from which the *authority* of the law proceeds The material sources are those from which is derived the *matter* and not the *validity* of the law The formal source of the civil law is one, viz *the will and power of the state* as manifested in courts of justice" The *matter* of the law may be drawn from all kinds of material sources

What is meant by sources of Law? How does Salmond classify several sources of law?
B L Apr 1933

Distinguish between Formal and Material sources of law
B U Oct 1929
1937
1939

Kinds of Material sources

These are *(a) legal* and *(b) historical*

(i) The former are those sources which are *recognised as such by the law itself* The historical sources are *destitute of legal recognition*

State all the different sources of law with examples
B U Oct 1932
Apr 1937

(ii) The legal sources are *authoritative*, (e g the decisions of English courts are a legal and authoritative source of English law, but those of American courts are in England merely a historical or unauthoritative source), whereas *historical sources are unauthoritative*

What are the legal sources of law?
B U Oct 1931

(iii) The legal sources are allowed by the law courts as of *right*, historical sources have no such claim

Legal and historical sources distinguished

"*Legal Sources*'—It is the name given to those sources which are the instruments or organs of the State by which legal rules are created *e g*, legislation, and custom They are authoritative They are allowed by the Law Courts as of right They are the gates through which new principles find admittance into the realm of law

Distinguish between the Legal and Historical sources of law
B U Apr 1938

"*Historical Sources*"—They are places where rules subsequently turned into legal principles, were first to be found in an unauthoritative form They are not allowed by the Law Courts *as of right* Some examples are

religion, morality and opinion of text writers They operate only mediately and indirectly Ultimate legal

Kinds of legal sources

1 *Legislation* —It is the making of law by the forma and express declaration of new rules by some authority in th body politic, which is recognised by the Courts of law as com petent for that purpose There must principles from selves self exist Parliament has is historical onl will be binding down A legal ultimate princip

What are the legal sources of law?
B U Oct 1931
Apr 1939

Law which has its origin in legislation is called *enacted law* Austin calls it statute law,

2 *Precedent* —It is the establishing of law by the recogni tion and application of new rules by the Courts themselves i the administration of justice

Precedent produces *case law*

3 *Custom* —Law based on it is known as *customary law*

4 *Agreement* —Terms of agreement constitute *conven tional law* for the parties

Conventional law is that which is constituted by agreement as having the force of special law *inter partes* in derogation of or in addition to the general law of the land

5 *Professional opinion* —This may be called *juristic law*

Source of law and source of rights distinguished

The sources of *law* may also serve as sources of *rights* By a source of title of rights is meant some fact which is legally constitutive of *rights* It is the *de facto* antecedent of a legal *right* just as a source of law is the *de facto* antecedent of a legal *principle*

Distinguish between sources of law and sources of rights
L U Apr 1933
1937
1943

An examination of any legal system will show that to a large extent the same classes of fact which operate as sources of *law* operate as sources of *rights* also These two kinds of sources form intersecting circles Some facts create law but not rights some create rights but not law some create both at once An Act of Parliament is a typical source of *law* while numerous private Acts *e g* an Act of Divorce an Act granting a pension for public services are clearly titles of legal *rights* A judicial decision is a source of *rights* as between the *parties* while it is a source of *law* for the *world at large* Regarded as creative of *rights* it is called a *judgment* regarded as creative of *law* it is called a *precedent*

Ultimate legal principles

There must be found in every legal system certain ultimate principles from which others are *derived* but which are themselves self existent In English law, the rule that the Acts of Parliament have the force of law is legally ultimate, its source is historical only and not legal The rule that judicial decisions will be binding precedents is also underived, no statute lays it down A legal system may recognise any number of these ultimate principles but is not bound to recognise *more than one*

Write a note on Ultimate legal principles
B U Apr 1935

CHAPTER III

LEGISLATION

Definition

What is meant by Legislation?
B U Apr 1939

Legislation consists in the declaration of *legal* rules b
a competent authority, *conferring upon such rules the forc*
of law ''

Indirect legislation

Explain Indirect Legislation
B U Apr 1929
1938

The word legislation' is sometimes used to include *all* methods of law making

Thus when judges establish a new principle by means of a judicial decision they may be said to exercise *legislative* and not merely *judicial* power Let this is *not* legislation in the strict sense already defined

Kinds of Legislation

Distinguish between Supreme and Subordinate legislation
B U Apr 1930
1937
1939

Legislation is either *supreme* or *subordinate* The former is that which proceeds *directly from the sovereign power* in the State and is therefore free from any external control *Subordinate legislation* is that which proceeds from any authority *other than* the sovereign power and is, therefore dependent for its continued existence and validity on some supreme or superior authority

Legislation is either supreme or subordinate Show the distinction between the two and discuss the chief forms of the latter
B U Oct 1939

Subordinate legislation is of five chief forms—

1 *Executive*

Write a short note on Subordinate Legislation'
B U Mar 1942

2 *Judicial* —The superior courts have the power of making rules for the regulation of their *own* procedure

Under what category will you place legislation by (1) the Parliament (2) the Federal legislature of India? Give reasons for your answer
B U Apr 1939

3 *Colonial* —The powers of self government entrusted to the colonies and other dependencies of the Crown are subject to the control of the Imperial Legislature which may repeal alter or supersede any colonial enactment

Explain Autonomic Law'
B U Apr 1929
1934

4 *Municipal* —Municipal authorities are entrusted with power of establishing *special* law for the districts under their control

5 *Autonomic law* —By this is meant that species of

nacted law which has its source in various forms of subordinate and restricted legislative authority possessed by *private* persons and *bodies* of persons

A railway company, for example may make by laws for the regulation of its undertaking or a university may make statutes for the government of its members Legislation thus effected is called *autonomic*'

Autonomic law and Conventional law distinguished

Distinguish between 'Autonomic law' and 'Conventional law'

B U Apr 1934

Conventional law is the law which has its source in the *agreement* of those who are subject to it Agreement is a law for those who make it, which supersedes, supplements or derogates from the ordinary law of the land *e g* articles of association of a company, articles of partnership There is a close resemblance between autonomic law and conventional law but there is also a real difference between them The creation of each is a function entrusted by the state to private persons But conventional law is the product of *agreement* and, therefore is law for none except those who have *consented* to its creation Autonomic law on the contrary is the product of a true *form of legislation*

There is a close resemblance between autonomic law and conventional law but, there is also a real difference between them. Comment

B U C 1936

Merits of statute law and case-law

Discuss the comparative advantages of Legislation and precedent as the making and developing of law

B U Oct 1921
Oct 1934

The advantages of legislation can be best considered by contrasting it with precedent

Discuss the relative merits of Statute Law and Case Law

B L Mar 1935

1 *Abrogative power* —Legislation is both *constitutive* and *abrogative*, while precedent possesses *constitutive* efficacy The first virtue of legislation lies in its *abrogative* power It is not only a source of *new* law, but is also the most effective instrument of *abolishing* the existing law

Discuss the relative merits of Statute Law and Precedent

B U Oct

Precedent, on the other hand, does not possess that abrogative power which is so necessary for legal reform It can produce *new* law, but it cannot *reverse* worn out law

Legislation, therefore is an instrument, not indeed of legal *growth*, but of legal reform

2 *Efficiency* —Legislation effects a *division of labour* which results in increased efficiency It distinguishes the legislature from the judiciary The duty of the legislature is to *make* the law, while the duty of the judiciary is to *interpret* and *apply* the law Placing, on the contrary, the same hands the power to make the law and that of *enforcing* it

Contrast Legislation with Precedent

B U Oct 1930

State in what respect legislation is superior to other modes of legal evolution?

B U Apr 1932

Explain the following statement — Legislation has proved more efficient than other forms of developing law and is taking their place'

B U Oct 1938

Case law is gold in the mine a few grains of the precious metal to the ton of useless matter—while Statute Law is coin of the realm ready for immediate use" Discuss this and examine critically the merits of legislation as a source of law

B U Oct 1934

Write a short note on Codification

B U Apr 1923

Unenacted law is the principal and enacted law is merely accessory Do you agree with this view?

B U Apr 1932

What is meant by the interpretation of enacted statute

B U Mar 1921
Apr 1931

3 *Declaration* —Legislation is again superior to precedent because before a statute is applied by Courts of justice it is *formally declared* Justice requires that laws should be known before they are applied and enforced by the Law Courts Case law on the contrary, is created and declared *in the very act of applying and enforcing* it The Courts of law apply it as soon as they make it without making any formal *declaration* of it Besides it operates retrospectively and applies to facts which are *prior* in date to the law itself

4 *Provision for future cases* —Legislation makes rules for cases that have *not yet arisen*, whereas precedent must need *wait* until the *actual concrete instance* comes before the court for decision

5 *Form* —Finally, statute law is greatly superior to case law in point of *form* It is *brief, clear*, easily *accessible* and *knowable* while case law is buried from sight and knowledge in the huge and daily growing mass of the records of litigation *'Case law is gold in the mine while statute law is coin of the realm ready for immediate use"*

Codification of laws

The advantages of enacted law are so great that the tendency in modern times is to reduce the whole law to the form of *enacted* law This is known as '*codification*'

The old theory is that the common law is the basis and ground work of the legal system *Unenacted law is the principal and enacted law is merely accessory* The activity of the legislature is called for only on special occasions to do that which lies beyond the constructive or remedial efficacy of the common law Codification however must not be understood to involve the total *abolition* of precedent as a source of law Case law *will* continue to grow even when the codes are complete In the most carefully prepared codes subtle ambiguities will come to light real or apparent inconsistencies will become manifest The function of precedent will be to *supplement* to *interpret* to *reconcile* and to *develop* the principles which the code contains

Principles relating to interpretation of statute law

Interpretation is that '*process by which the courts seek to ascertain the meaning of the legislature through the medium of the authoritative forms in which it is expressed*"

Kinds of interpretation

State the principles which should guide the judicature in the interpretation of enacted law

B U Oct 1927

Intepretation is of *two* kinds —*grammatical* and *logical* The *former* regards exclusively the verbal *expression* of the law It does not look beyond the letter of the law *(litera legis)* *Logical interpretation*, on the other hand, is that which *departs* from the letter of the law, and seeks *elsewhere* for some other and more satisfactory evidence of the true *intention* of the legislature *(sententia legis)*

Principles of interpretation —

The principles which guide the judicature in the interpretation of enacted law are the following —

What is meant by Interpretation of Law"?

B U Apr 1931

In all ordinary cases *grammatical interpretation is the sole form allowable* "The courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis* They must generally take it absolutely for granted that the legislature has *said* what it *meant*, and meant what it has said" "Judges are not at liberty to *add* to, or *take* from, or *modify*, the letter of the law, simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed"

Under what circumstances will a court disregard the litera legis as the exclusive and conclusive evidence of the sententia legis?

B U Mar 1921

As stated above the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis* To this general principle of interpretation there are *two exceptions* —

EXCEPTION I—The first exception is where *the letter of the law is logically defective* i e when it fails to express some definite idea

The logical defects are three in number —

State the principles commonly adopted by Courts of Law in the construction of Statute Law

B U Apr 1934
Oct. 1938

1 *Ambiguity* —A statute, instead of meaning one thing, may mean two or more different things In such a case, it is the duty of the courts to go *behind* the letter of the law to ascertain from *other* sources the true *intention*

Discuss the relative claims of the letter and the spirit of

2 *Inconsistency* —A second logical defect of statutory expression is *inconsistency* A law, instead of having *more* meanings than one, may have *none* at all In such a case judges

enacted law and the principles which guide the Courts on this matter

L U Apr 1938

have to ascertain the *spirit* of the law, *(sententia legis)* and correct the *letter* of the law *(litera legis)* accordingly

3 *Incompleteness* —Lastly, the law may be logically defective by reason of *incompleteness* The text may contain no *lacuna* (gap) which prevents it from expressing any complete idea In such a case the courts may supply the omissions by way of logical interpretation

EXCEPTION II —"The *second exception* in which logical interpretation is entitled to *supersede* grammatical, is that in which the text leads to a result so *unreasonable* that it is self evident that the legislature could *not* have meant what it has said There may be an obvious *clerical* error in the text "—Salmond

Is an unreasonable statute or bye law made under a statute enforceable at law ?

B U Oct. 1927

NOTE.—Even if a statute or a bye-law is unreasonable such a Statute bye law is enforceable at Law Because the duty of the judicature is administer the law *as it is* They cannot go *behind* it to see whether it, or what extent it is *unjust* or *unreasonable* That is the function of the *Legislature* and the Legislature *alone* can consider the alteration or modification an unreasonable Law Unless and until this has been done the Judge must enforce it as it stands

CHAPTER IV

PRECEDENT

Force of precedents in English law

Carefully trace the part which precedent has played in the growth and development of the law
B U Apr 1929

In England case law is treated with as much respect as Statute law In England a judicial precedent speaks with authority it is not merely *evidence* of the law but a *source* of it This is chiefly due to the peculiarly powerful and authoritative position which has been at all times occupied by the English judges

Write a short note on —Judgment and Precedent
B U Oct 1939

The practice of citing precedents began in England in the time of Edward I At first decisions were cited not as binding precedents but as indicating the true law From the time of James I however the view is established that the duty of the Judges is to follow precedents This is the distinguishing characteristic of English law and of the systems founded upon it

"A judical precedent in England etc established' Comment
B U Oct 1933

Many Continental Systems following the Roman law do not regard judicial decisions as having binding force though they may be useful as showing the view of the law held by a qualified body of men In most of these countries a previous decision is merely instructive and not authoritative It is an evidence of law it is an instrument for the persuasion of the Judges and is nothing more The English system, on the other hand, attaches great weight to the judicial decision *A judicial precedent speaks in England with authority, it is not merely evidence of the law but a source of it and the Courts are bound to follow the law that is so established*

The authority of precedent has been specially great in England for two reasons — (i) The concentration and centralisation of the administration of justice in the hands of Judges (ii) The skill and professional reputation of the English Judges

Kinds of precedents

Authoritative and persuasive

Define Authoritative precedent
B U Apr 1934

An authoritative precedent is one which the Judges *must* follow whether they approve of it or not It is *binding* upon them and *excludes their judicial discretion* for the future

What are Persuasive Precedents?
L U Apr 1934
Oct. 1935

A persuasive precedent is one which the Judges are under *no obligation to follow* but which they will *take into consideration* and to which they will attach *such* weight as it seems to *them* to deserve

Distinguish between Authoritative and Persuasive precedents
B U Oct 1929, 1932 Apr 1934 Oct 1936 Apr 1939 1943

The authoritative precedents recognised by English law are the decisions of the superior Courts of justice in England *The chief classes of persuasive precedents are the following* —

(1) The judgments of the Privy Council when sitting as the *Court of Appeal from the Colonies*

(2) The decisions of superior Courts in other portions of the British Empire for example, Irish Courts

(3) Foreign judgments, and more especially those of American Courts

Give three illustrations of persuasive precedents
B U Oct 1932

When are precedents of absolute authority and when of conditional authority?
Oct 1928

A precedent may be absolute in its nature i e it is binding at all events It may be *conditional* as when its authority may be dissented from

In England absolute authority exists in the following cases —

(1) Every Court is absolutely bound by the decisions of all courts *superior* to itself

(2) The House of Lords is absolutely bound by its *own* decisions.

(3) The Court of Appeal is absolutely bound by its *own* decisions and by those of other courts of *co-ordinate* authority

State how far the various courts are bound by previous decision in England
B U Apr 1927

RULES AS TO AUTHORITY OF PRECEDENTS

	In England		In India
1	Every court is bound by the decision of a superior court	1	The decisions of the Privy Council are of the highest authority
2	The decisions of the House of Lords have got the highest authority	2	The decisions of one High Court are not authoritative with regard to another High Court
3	The decisions of the Privy Council although it is a court of appeal are in theory not regarded as unquestionably authoritative though in practice it has as much respect as the House of Lords	3	In the same High Court the decision of a single judge is binding on another single judge but not on a court of Appeal
4	The individual judges are not bound by the decisions of each other The House of Lords and the Court of Appeal are governed by its previous decisions	4	A judge of the lower court is bound to follow the ruling of the High Court of his own presidency when there is a conflict amongst the High Courts
5	The judicial committee i e the Privy Council is not in theory governed by its previous decisions but in practice it departs with the greatest reluctance from its previous decisions	5	Unreported judgments have as much binding authority as reported ones

State how far the various courts are bound by previous decisions in case of India
B U Apr 1927

Name some of the courts whose decisions are absolutely binding on the Bombay High Court
B U Oct 1928

What are the classes of authoritative and persuasive precedents so far as the Bombay High Court is concerned?
B U Oct 1933

Declaratory and Original

Enumerate and explain the various kinds of precedents
B U Apr 1938
Oct 1939

A *declaratory* precedent is one which is merely the *application of an already existing rule of law*, an *original* precedent is one which *creates* and applies a *new* rule A declaratory precedent is not a source of *new* law

What is the Declaratory Theory of Precedent?
B U Oct 1924

Ordinarily, declaratory precedents are far more *numerous* than original precedents for, on most points the law is already settled and judicial decisions are therefore commonly mere declarations of pre-existing principles Original precedents, though *fewer* in number, are greater in *importance* For they alone *develop* the law

Declaratory theory of Precedents

What is the declaratory Theory of Precedent? Does Salmond accept this theory?
B U Oct 1924

The *old theory* in England was that precedents were declaratory merely Their original operation was not recognised Common law was regarded as customary law 'Judge-made law or case law was considered a fiction According to this orthodox theory Judges expound declare and publish the law but do not make it "Judges, says Blackstone are delegated not to pronounce a new law but to maintain and expound the old one" This view never prevailed in the Court of Chancery There could be no pretence that the principles of equity were founded in custom, for they obviously had their origin in judicial decisions *The declaratory theory is now rejected* with regard to common law also and it is admitted openly says Salmond, that precedents make law as well as declare it" Austin describes this orthodox theory as a childish fiction"

Nature of precedents

Examine the following statement — Precedents are purely constitutive and in no degree abrogative"
B U Apr 193

The power of precedents to make law is *purely constitutive and in no degree abrogative* In other words *judicial decisions may make law, but they cannot alter it* Where there is a settled rule on any point the judges have no authority to substitute for it a law *of their own making* Their legislative power is strictly limited to supplying the vacancies of the legal system, to *filling up with new law the gaps which exist in the old to supplementing the* imperfectly developed body of legal doctrine This statement however, requires two qualifications —

1 —In the first place it must be read subject to the undoubted power of the Courts to overrule or disregard precedents

Write a short note on the following — "What should not be done yet shall be valid"
B U

2 —The rule that a precedent has no abrogative power must be read subject to the maxim, *Quod fieri non debet factum valet* Though the Judges are appointed to follow the law and not to subvert it yet if the rule is broken through and a precedent is established which conflicts with pre-existing law, it does not follow from this *alone* that this decision is destitute of legal efficacy For it is a well known maxim of the law that *a thing which ought not to have been done may nevertheless be valid when it is done*

State and discuss the grounds for the authority of Precedents

B U Oct 1924
1929
Apr 1933
Oct. 1938

Write a short note on A thing adjudicated is received as true

B U Oct 1930

Grounds for recognising precedents

The operation of precedents is based on the legal presumption of the *correctness of judicial decisions* A matter once formally decided is decided once for all That which has been delivered in judgment must be taken for established truth For in all probability it is true in fact, and even if not, it is *expedient* that it should be *held* as true none the less

The operation of original precedents is therefore the progressive transformation of questions of fact into questions of law *ex facto oritur jus*

Explain fully how with the development of a legal system Questions of fact are transformed into Questions of law

B U Oct 1932

Write a short note on — 'The Law arises from facts"

B U Oct 1930

For example when for the first time the question arises whether the word cattle includes horses the question is purely one of fact and the Court is free to answer it one way or the other in accordance with its judicial discretion But when the question has once been decided It is for the future one of law, and no longer one of fact for the Court is now provided with a pre-determined answer to it, and it is no longer a matter of free judicial discretion the Court in future cases must answer in the same way as before

When is a Court justified in disregarding a precedent?

B U Oct. 1934
Apr 1938

Precedent when not respected

In order that a court may be justified in disregarding a precedent *two* conditions must be fulfilled

1 The decision must, in the opinion of the court in which it is cited, be a *wrong* decision, being contrary to law or reason

When is a court justified in disregarding a conditionally authoritative precedent?

B U Mar 1921
Oct 1923
Apr 1927
Oct. 1934

2 In the *second* place the circumstances of the case must not be such as to make applicable the maxim, *communis error facit jus* The defective decision must not, by the lapse of time or otherwise have acquired such added authority as to give it a title to permanent recognition *notwithstanding* the vices of its origin 'It is often more important that the law should be *certain* than that it should be *ideally* perfect"

Ratio decidendi

Write a short critical explanatory note on Ratio decidendi

B U Oct. 1928
1932
Apr 1936
Oct. 1936
Apr 1939

A precedent is a judicial decision which contains in itself a principle The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi* The *concrete decision* is binding between the *parties* to it, but *it is the abstract ratio decidendi which alone has the force of law as regards the world at large"*

Obiter dicta

What is meant by 'Obiter dicta' and what is their value as precedent?

B U Oct 1928 Apr 1930 Oct 1932 Apr 1936 Oct 1936 Apr 1939

All that is said by the Court *by the way*, that is to say statements of law which go *beyond the requirements of the particular case*, and lay down a rule that is *irrelevant* or *unnecessary* for the purpose in hand are called *obiter dicta*. These *dicta* possess only the force of *persuasive precedents*.

Functions of judge and jury

Distinguish between the respective functions of judges and juries

B U Oct 1931 Apr 1937

It is commonly said that all questions of fact are for the Jury and all questions of law for the Judge. Original precedents which serve as the source of judicial principles are answers to questions of *fact*. Are such precedents then, made by *Juries* instead of by *Judges*? The truth of the matter is that although all questions of law are for the Judges, *all* questions of fact are *not* for the Jury.

Can a question of fact decided by a jury have the same effect as a question of law? Give reasons

B U Oct 1932

The rule consistently acted upon is that a Judge will not submit to the Jury any question which he is himself capable of answering *on principle*. The only questions which go to the Jury are such questions of fact which admit of no principle. The questions of fact which can be answered *on principle* are withdrawn from the cognizance of the Jury by means of a legal fiction that they are *already* questions of law.

PART III

PRINCIPLES AS TO THE STATE AND CUSTOM

CHAPTER I

THE STATE

Definition

A state is '*a society of men established for the maintenance of peace and justice (within a determined territory) by way of force*

Define a state
B U Oct 1920
Apr 1937

Primary and essential function of the State

The end of every organised political association is to provide *defence against external enemies* and to maintain peaceable and orderly relations within the association itself The sovereign, according to Hobbes carries two swords—the sword of *war* and that of *justice* *The essential functions, therefore, of a modern political State are war and administration of justice*

State and explain the essential functions of the state
B U Oct 1920
1929 1927 1935

What are the chief attributes of a state?
B U Apr 1937
Oct 1938

Every organised political society which performs these two functions is a State, and none is such which does not perform them These are the two methods by which a State fulfils its appointed purpose of establishing right and justice by physical force It is thus a combination of *right* as well as *might*

Describe briefly the various functions of the State and the combination of might as well as of right in its constitution
B U Oct 1922

War and administration of justice distingnished

Judicial, and extra judicial use of force

Force is *judicial* when it is applied by or through a tribunal, whose business it is to judge or to arbitrate between the parties who are at issue It is *extrajudicial* when it is applied by the state *directly* without the aid or intervention of any such Judge or arbitrator Judicial force involves trial and adjudication, as a condition precedent to its application, extrajudicial force does not The primary purpose of judicial force is to *execute* judgment against those who will not voluntarily yield obedience to it Only indirectly and through such judgment does it enforce rights and punish wrongs But extrajudicial force strikes *directly* at the offender It recognises no *trial* or *adjudication* as a condition of its exercise When a rebellion or a riot is suppressed by troops, this is the *extrajudicial* use of force, but when after its suppression, the rebels or rioters are *tried sentenced* and *punished* by criminal *Courts* the force so used is *judicial*

'The sword of justice is a phrase sufficiently indicating the truth that action against the public enemy and action against the private enemy are in last resort the same' Spencer Comment briefly on this statement
B U Oct 1905

War and administration of justice however diverse in appearance are merely two different species of a single genus The essential purpose of each is the same though the methods are different Discuss the several parts of this statement of Salmond
B U Apr 1930
1934

2. Law

Distinguish between judicial and extra judicial forces of the State
B U Apr 1931

Judicial force is regulated by *law* while the force of is usually exempt from such control Justice is accordi law, war is according to the good pleasure of those by wh is carried on As between the State and its external en the civil law is wholly silent

3 Persons States

Comment on the following statement The fundamental purpose and end of political society is defence against external enemies and the maintenance of peaceable and orderly relations within the community itself What is the essential difference between thise two functions?
B U Feb 1930

Judicial force is commonly, though not always, exe against *persons*, extrajudicial force against *States*

4 Internal, external

The administration of justice is generally the *int* while war is generally the *external*, exercise of the power c State In other words, the State commonly proceeds a internal enemies by way of judicial, and against ex enemies by way of extrajudicial, force

5 Latent, patent

In the administration of justice the element of for commonly *latent* or *dormant* whereas in war it is seen in *exercise*

Secondary functions of the State —

The primary and essential functions of the State ar mentioned above, war and the administration of justice *secondary functions* are many and may be devided into *clases* —

1 Legislation

What are the secondary functions of a state?
B U Oct 1927

Legislation is the formulation of the principles in ac dance with which the State intends to fulfil its function administration of justice

2. Taxation

Taxation is the instrument by which the State obtains revenue which is the essential condition of all its activities

3. Other activities

We have then all *other* activities undertaken by the St Examples of this class are very numerous in modern tin *e g*, post office, railways, education *etc*

itles to state membership

Discuss fully the two titles to the member ship of a state

B U Apr 1929
Oct 1929
Apr 1935

"The title of state membership is *two fold*, and the members of the body politic are of *two classes* The two titles are *citizenship* and *residence* The former is a *personal*, the latter merely a *territorial* bond between the state and the individual he former is a title of *premanent*, the latter one of *temporary membership* of the political community "

Discuss citizenship and residence as titles of state mem bership

B U Oct 1925
1937

Write a short note on citi enship

B U Oct 1932
1934
Apr 1937

ubject and Citizen

Many men, belong to the state by *one title* only They are subjects of the state, but not *resident* within the dominions of he state or they are *resident* within the dominions, but are *ot subjects* In other words, they are either non resident ubjects or resident aliens Non resident aliens possess ho itle of membership and are not within the power and juris iction of the state

Are the two terms 'Subject' and "citi -zen" synonymous?

B U Apr 1937

ights and liabilities of a citizen

What are the rights and liabilities of a Citi en?

B U Oct 1930

The relationship between a state and its members is one of reciprocal obligation The state owes *protection* to its members, while they in turn owe *obedience* and *fidelity* to it

What are the supe rior privileges which citi ens enjoy as compared with ali ens?

B U Oct 1929

Allegiance

The duty of assistance, fidelity and obedience is called *allegiance* Subjects owe *permanent* allegiance to the state Resident aliens owe *temporary* allegiance during the period of their residence

Write a short note on—Allegiance

B U Apr 1936

British subjects alone possess politi cal as opposed to civil rights Comm ent on the above statement

B U Mar 1934

10 Citizenship is a title to rights which are not available for aliens Thus British subjects alone posses political as opposed to merely civil rights Let us see how this is so It is to be noted that until a few years ago they alone were capable of inheriting or holding land in England to this day they alone can own a British ship or any share in one they alone are entitled when abroad to the protection of their government against other states, or to the protection of English Courts of law against illegal acts of the English executive they alone can enter British territory as of right they alone are entitled to the benefit of certain statutes from the operation of which aliens are expressly or by implication excluded.—Austin.

Concept of Citizenship

Distinguish between citizenship and Nationality
B U Apr 1943

Citizenship is a legal conception Nationality is *membership of a nation* citizenship is *one kind of membership of a State* A nation is a society of men united by common blood and descent A state on the other hand, society of men united under *one government*

Explain and comment Citizenship is a legal conception the importance of which is continuously diminishing
B U Apr 1925, 1937

The historical origin of the conception of citizenship is to be found the fact that the State has grown out of the nation The state in its or is the nation politically organised for the purposes of government and defence The citizens are the members of a nation which has thus develo into a State —Holland Men become united as fellow-citizens because are or deemed to be already united by the bond of common kinship.

Constitution of the State

Every state *must* have a permanent and definite organisati a determinate and systematic form, structure and operati The organisation of a modern state is divisible into two pa The first part consists of its *fundamental* or *essential* elemer the second consists of the *details of state structure* first essential and basal portion is known as the *constitution* the state

Discuss briefly — The constitution de facto is logically prior to the constitution de jure
B U Apr 1925

The constitution as a matter of *fact* is logically *prior* to constitution as a matter of *law* There may be a state, an constitution *without* any law, but there can be no law, withou state and a constitution

Kinds of states

These are of *three* kinds —

1 Unitary and Composite

Distinguish between Unitary and Composite states
B. U [Oct. 1936

A *unitary* or *simple* state is one which is not made up territorial divisions *which are states themselves* A *composite state* on the other hand, is one which is itself an aggregate group of constituent states

Composite states are of two kinds —

(*a*) *Imperial* and (*b*) *Federal* In an Imperial state th government of *one of the parts* is the common government o all In a federal state the common government is not of one of its parts but a *central government* in which all constituent states participate

2. Independent and dependent

An *independent* or *sovereign state* is one which possesses a *separate existence*, being *complete* in itself, and not merely a part of a larger whole to whose government it is subject The British Empire is an independent state

A *dependent* or *non sovereign state* is one which is not complete and self existent, but is merely a constituent portion of a grater state which includes both it and others and to whose government it is subject The Dominion of Canada is a dependent state, for it is subject to the control of the British Empire

3 Semi-sovereign

Independent states are of two kinds —

(*a*) Fully sovereign and (*b*) Semi sovereign A *fully sovereign* state is one whose sovereignty is in no way derogated from by any control exercised over it by *another* state A *semi sovereign* state is one which is *subordinate* to some other

What is Sovereign State? State giving reasons, if the following are Sovereign States —(i) India (ii) Canada

B U Apr 1939

CHAPTER II

CUSTOM

Its efficacy

State and discuss reasons for attributing law creative efficacy to custom
B U Apr 1943

The importance of custom as a source of law continuously diminishes as the legal system grows" Comment and give reasons for your answer
B U Apr 1933
Oct 1938

The importance of custom, as a source of law, ten continuously to diminish as society advances and its leg system develops As an instrument of the development English law in particular it has now almost ceased to opera There are two reasons for this —

1 Custom has to a large extent been superseded by legislati and precedent as modes of developing the law

2 The legal requirements of a valid custom are such that f customs can conform to it In the first place custom cann derogate from statute law, and in the second place, unless t custom is general, it must be immemorial or otherwise consistent with the common law also

Write a short note on Custom as a source of law'
B U Oct 1942

"Nevertheless even now custom has not wholly lost its law creating efficacy *It is still to be accounted one of the leg sources of the law of England, along with legislation and precedent*"

Discuss briefly Custom is to society what law is to the state'
B U Apr 1925
Oct. 1936

Custom is to society what law is to the state *Each is th expression and realization to the measure of men's insight an ability, of the principles of right and justice* When the stat takes up its function of administering justice, it accepts as tru and valid the rules of right already accepted by the societ of which it is itself a product, and it finds these principle already realised in the customs of the realm

"Another ground of the law creative efficacy of custom is t be found in the fact that *the existence of an established custom i the basis of a rational expectation of its continuance in the future*' Justice demands that unless there is good reason to the contrary men's rational expectations shall be fulfilled rather than frustrated, even if the customs are not *ideally* just and reasonable

Its kinds

Customs, which have the force of law, are of two kinds, *legal* and *conventional*

1 Legal

A legal custom is one which has the force of law irrespective of any agreement on the part of those who are bound by it, its legal authority is absolute

Distinguish between Conventional Custom and Legal Custom
B U April 1934

2 General

3 Local

Legal custom is itself of two kinds it is either general or local Where a custom is observed by *all* the members of a society, it is a *general* custom Where a custom is observed by *residents of a particular locality*, it is a *local* custom

Local custom is one which prevails in some defined locality, and constitutes a source of law for that place only General custom is that which prevails throughout England, and constitutes one of the sources of the common law of the land The term 'custom' in its narrowest sense means local custom exclusively The general custom of the realm is distinguished from custom in this sense as the common law itself

4 Conventional

A conventional custom is one whose authority depends on its being incorporated expressly or impliedly in an agreement between two or more parties to regulate their mutual relations

Custom which does not fulfil *all* the requirements mentioned below does not necessarily fail of all legal effect It may be legally operative *by being incorporated into* a contract, lease or tenancy, may be distinguished as '*conventional*' Even customs which are not in themselves *authoritative as sources of law* may be legally operative through the added authority of agreement

Its requisites

To be fully operative as a source of law, a custom must satisfy the following five requirements

CUSTOM

What are the requirements of a valid custom?

B U Mar 1920
1923
Oct 1926
1927
1931
1936
1939

1 Reasonableness

A custom must be reasonable The authority of usage is not absolute but conditional on a certain measure of conformity with justice and public utility

2 Immemorial antiquity

What is the rule about the immemorial antiquity of a custom?

B U Apr 1929

It is necessary to distinguish between two kinds of customs namely those which are *general*—the customs of the *realm* prevailing *throughout* the *whole* territory—and those which are *local* being limited to some special *part* of the realm A custom which is merely *local* must have existed from *time immemorial* In the case of *other* customs however there is no such requirement It is sufficient that the usage should be *definitely established* and its duration is *immaterial*

The rule therefore that a custom is invalid unless immemorial means practice and as interpreted in the Courts in England this that if he disputes its validity can prove its *nonexistence* at any time between the preseday and the twelfth century it will not receive legal recognition *Simpo*

How has the rule about the immemorial antiquity of a custom been interpreted in the courts in England and in India?

B U Apr 1929

V Well Bryant V Foot

The principle laid down by Grey C J by way of analogy to the English legal memory in a reported case of the then Supreme Court of Calcutta is as follows In regard to Calcutta I should say that the Act of Parliament in 1773 which established this Court is the period to which we must go back to find the existance of a valid custom in regard to the Muffasil we ought to go back to 1793 *In re Garuadhwaja* (1900) 27 I A 329 It has been held by the Privy Council that the evidence of unbroken custom for eighty years since the British occupation of that province was sufficient

3 Opinio necessitatis

Explain the term 'Opinio necessitatis'

B U Mar 192_
19_6

The second requisite of a valid custom is that which jurists term *opinio necessitatis* By this is meant an *ethical conviction* on the part of those who use a custom that it is *obligatory* and not merely *optional* Custom merely as such, has no legal authority at all It is legally effective only because it is the expression of an underlying principle of *right* approved by those who use it

State and discuss the requisites of a valid custom

L U Apr 1943

4 Conformity with statute law

A custom must not be contrary to an Act of Parliament The common law will yield to immemorial usage but the enacted law stands for ever

Conformity with the Common Law

Unless immemorial, a custom must be *consistent with the common law* That it must be consistent with *statute law* is applicable to *all* customs *whether immemorial* or *not* That it must be consistent with the *common* law is a rule applicable only to *recent* customs and not to those which have the prestige and authority of immemorial antiquity

What are the requirements of a valid custom?

B U Mar 1920
1923
Oct 1926
1927
1931
1936
1939

Custom and prescription distinguished

1 Custom is long usage operating as a source of *law*, prescription is long usage operating as a source of *rights*

2 Prescription and custom were formerly regarded as the species of the same genus and thus many of the essential requisites of both, for example, that of reasonableness consistency with statute law, immemorial antiquity, were similar in many respects, till a process of gradual differentiation set in In the case of custom the old rule as to time immemorial still subsists, but a *prescriptive right* is now finally acquired by enjoyment for *twenty years*

Distinguish between Custom and Prescription' and briefly explain and discuss the statement The requisites of a valid prescription were in essence the same as those of a valid custom'' enumerating all such requisites

B U Oct 1926
1931

Theories of customary law

There are two theories of customary law —

The first of these is a characteristic feature of *foreign* and more especially of German jurisprudence being chiefly due to the influence of Savigny It essentially consists in this, *that custom is rightly to be considered as a formal and not merely as a material source of law* According to this view custom does *itself* confer the force and validity of law upon the principles embodied in it It operates *directly* through its own *inherent force* and authority, not indirectly by reason of its recognition and allowance by the supreme authority and force of the state Customary law, therefore has an existence *independent* of the state *It will be enforced by the state through its court of justice because it is already law It is not because it will be so enforced, that it is law*

Discuss the theories of customary law

B U Mar 1927
Oct 1932
1938

Salmond says that this theory is almost unanimously rejected by English jurists Custom says he, is a *material* not a *formal* source of law Its only function is to supply the principles to which the will of the state gives legal force Law is law only because it is applied and enforced by the state and where there is no *state* there can be no law From custom the state may draw the material contents of the rules to which it gives the form and nature of law

2 A second theroy of customary law is that which we may term *the Austinian* Austin considers that the true legal source of customary law is to be found in the precedents in which custom receives for the first time *judicial recognition and enforcement* Customary law is, according to Austin a variety of *case* law It follows from this that a custom does not acquire the force of law until it has *actually come to the notice of the courts* and received judicial *approval and application*

Salmond says that this opinion seems inconsistent with the established doctrines of English law on this point Custom is law not because it has been recognised by the courts but because it *will* be so recognised in accordance with fixed legal principles, if the occasion arises. Its validity is not the accidents of litigation

What is according to Salmond the correct theory of customary law?
B U Oct 1921

The correct theory according to Salmond —is that custom although not a formal source of law, falls under that kind of material sources which are termed *legal sources*' that is to say its authority as a law-creative source depends upon an antecedent rule of the law which recognises the force of all sorts of customs Custom is a source of law *irrespective of* and even *prior to* the existence of *a judicial decision upon it*

PART IV

THE LAW OF RIGHTS

CHAPTER I

LEGAL RIGHTS

efinition

"A right is an interest *recognised and protected* by a rule f right It is an interest, respect for which is a *duty*, and the isregard of which is a *wrong*" Bentham

What is a legal right ?
B U Apr 1929
Oct 1939

loral and legal rights

Rights like wrongs and duties are either *moral* or *legal* A moral or *atural* right is an interest recognised and protected by a rule of natural ustice, A legal right is an interest *recognised* and *protected* by a rule of legal ustice *'Rights'*, says Ihering, *are legally protected interests'*

egal wrong

"A wrong is simply a wrong *act*—an act contrary to the rule of right and justice A synonym of it is *injury* in its true and primary sense of *injuria*" This term has acquired a *secondary sense* of harm or damage whether *rightful* or *wrongful* Wrongs or injuries are either *moral* or *legal*

What is a legal wrong ?
B U Apr 1929
Oct 1939

Duty

"A duty is an *obligatory act*, it is an act the opposite of which would be a wrong Duties and wrongs are correlative The *commission* of a *wrong* is the *breach* of a *duty*, and the *performance* of a *duty* is the *avoidance* of a *wrong*" (Salmond)

'In order that an interest should become a *legal right*' Says Salmond it must obtain not merely legal *protection*, but also legal *recognition* The interests of *beasts* are to some extent protected by the law inasmuch as cruelty to animals is a criminal offence The duty of humanity so enforced is not conceived by the law as a duty *towards* beasts but merely as a duty *in respect* of them

Discuss briefly "A man s interest may obtain legal protection as against himself
B U Oct 1928

Similary a man s interests may obtain legal protection *as against himself*, as when *drunkenness* or *suicide* is made a crime But he has not for this reason a legal right against himself The duty to refrain from drunkenness is not conceived by the law as a duty owing by a man to *himself* but as one owing by him to the *community* The only interest which receives legal recognition is that of the society in the sobriety of its members"

Austin's division of Duties] [illegible]

There can be no right without a corresponding duty or duty without a corresponding right any more than there can be husband without a wife or a father without a child Explain

B U Oct 1935
Apr 1936
1938
Oct 1942

"There can be no *right* without a corresponding *duty* *duty* without a corresponding *right*, any more than there can a husband without a wife, or a father without a child Ev right or duty involves a *vinculum juris* or *bond of legal obligati* by which two or more persons are *bound* together There can no *duty* unless there is some one *to* whom it is *due*, there can no *right* unless there is someone *from* whom it is *claimed*, there can be no *wrong* unless there is someone whose right been *violated*" Salmond

What is Salmond's view with regard to the classification of duties into 'relative' and 'absolute'? In what respects does Salmond differ from his predecessors in respect of this classification?

B U Oct. 1937

According to Salmond therefore, the distinction, drawn Austin into relative and absolute duties the former being th which have rights corresponding to them and the latter be those which have none, must be rejected According to t view held by Au tin the essence of a right is that it should vested in some *determinate* person and be *enforceable* by so form of legal process instituted by him and the duties towa the *public* at large or towards *indeterminate* portions of t public have no correlative rights the duty for example, refrain from committing a public nuisance Salmond says th there seems no sufficient reason for defining a right in *exclusive* a manner All duties towards the public correspo to rights vested in the public and a public wrong is necessari the violation of a public right All duties correspond to righ though they do not all correspond to *private* rights vested *determinate* individuals

Ownership of a right

The subject of a right means the *owner* of it, "There cannot be a right without a *subject* in whom it *inheres*, any more than there can be weight without a heavy body, for rights are merely attributes of *persons*, and can have no *independent* existence"

'A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs' Comment

B U Apr 1925
1932
Oct 1936

In ownerless right is an impossibility

'Yet although this is so the ownership of a right may be left merely *contingent* or *uncertain* Thus an estate may be left by a will to a person *unborn* at the death of the testator To whom does it belong in the meantime? We must say that it is presently owned by the unborn person but that his ownership is *contingent* on his birth The true situation is that although every right has an owner it need not have a *vested* and *certain* owner"

Explaining reasons whether any element of a legal right is missing in the respective claims of A C and D in the following case —(a) A an owner of a school, forced to close it down owing to keen but fair competition of a neighbouring school of B A claims damages from B (b) By a will a property is bequeathed to C for life and thereafter to a son born to him D the son was unborn at the death of the testator C and D assert their claims under the will

B U April 1938

Moreover a right without an object cannot exist

An object is an *essential element* in the idea of a right A right is a legally protected interest, and the object of the right is the *thing* in which the owner has this interest It is the thing, *material* or *immaterial* which he desires to keep or to obtain, and which he is enabled to keep or obtain by means of the duty which the law imposes on other persons *'A right without an object in respect of which it exists is, therefore as impossible as a right without a subject to whom it belongs"*

Can a Right exist without an object?

B U Apr 1938

2 A *person against whom the right avails* and upon whom the correlative duty lies He may be called the person *bound* or the *subject* of the duty

3 An *act or ommission* which is obligatory on the person *bound* in favour of the person *entitled* This is the *content* of the right

What are the essential elements of a legal right?

B U Oct 1920
Mar 1923
Oct 1930
Apr 1933

4 Some *thing* to which the act or omission relates and which may be termed the *object* or the *subject matter* of the right, and lastly,

5 A *title*, that is to say certain facts or events by reason of which the right has become *vested* in its owner

Objects of rights

What are the elements involved in the idea of a legal right?

B U Apr 1933
1939
Oct 1938
1939

The following are the chief kinds of legal rights with reference to their objects —

1 Rights over material *things*

2 Rights in respect of one's own *person*

3 The *right of reputation*

4 Rights in respect of *domestic relations*

Classify the different kinds of legal rights with reference to their objects

B U Mar 1923
Oct 1930
Apr 1933
Oct 1939

5 Right in respect of *other* rights

In many cases a right has *another* right as its subject matter Thus contract for sale, the buyer acquires a right to the right of ownership ov object of sale

6 Rights over *immaterial property*

Examples of these are patent rights copy rights trade marks commercial good will

7 Rights to *services*

KINDS OF LEGAL RIGHTS

1 Perfect and Imperfect

Distinguish between Perfect and Imperfect rights

B U Oct 19?5
Apr 1928
Oct 1931

'A *perfect right* is one which corresponds to a *perfect d* and a perfect duty is one which is not merely *recognised* by law but *enforced* A duty is enforceable when an action or o legal proceeding will lie for the breach of it"

Explain fully— Wherever there is a right there is a legal remedy

B U Apr 1937

Ubi jus ibi remedium where there is a right there remedy But there are some rights and duties which, tho *recognised* by the law, yet fall short of being *remedied* by physical force of the state

Examples of Imperfect Legal Rights are

1 Claims barred by lapse of time 2 claims unenforcea by action owing to the absence of some special *form* (such a written document)

What are imperfect rights?

B U Oct. 1930

'In all these cases the duties and correlative rights *imperfect No action will lie for their maintenance* yet th receive *recognition* from law *They remain valid for all purpo save that of enforcement* All these cases of imperfect rights exceptions to the maxim *Ubi jus ibi remedium* Thus in the c of a debt barred by the law of limitation, the debt is rendered *extinct* but merely the *right of action* is barred, so th lapse of time does not *destroy* the right but merely reduces from the rank of one which is *perfect* to an *imperfect* one Salmond

Give examples of Imperfect legal rights

B U Oct 1925

Imperfect rights when recognised?

The following are the purposes for which imperfect rights are recognised —

Are Imperfect rights recognised by law for any purposes? If so, what?

B U Oct 1925
Apr 1928

1 An imperfect right may be good as a *ground of defence*, though not as a ground of *action*

Can Imperfect rights be enforced? If so how?

B U Oct 1930
Apr 1936

2 An imperfect right is sufficient to support any security that has been given for it

3 An imperfect right may possess the *capacity* of becoming perfect The right of action which may be dormant may be *revived* [*See* S. 25 (3), *Ind Contract Act.*]

Give a brief general outline of the purposes for which the law will recognise an imperfect right.

B U Oct 1931

'A subject may claim rights against the state no less than against subject He can institute proceedings against the state for the determination and recognition of those rights in due course of law and he can obtain judgment in his favour But there can be no *enforcement* of that judgment The strength of the law is none other than the strength of the state, and cannot be turned or used against the state whose strength it is The state may of its free will and pleasure act according to the judgment The rights of the subject against the state are, therefore, *imperfect* They obtain legal *recognition* but no legal *enforcement*" Salmond

Discuss briefly — A subject may claim rights against the state"

B U Oct 1928

Proprietary and Personal

The aggregate of a man's proprietary rights constitutes his estate, his assets or his property" Such rights possess not merely juridical, but also economic significance They are *valuable* and are the elements of a man's *wealth*

Explain fully the distinction between personal and proprietary rights

B U April 1930
1934

Proprietary rights which constitute a person s estate are of two kinds viz those which are valuable in themselves and those which are accessory to other rights which are valuable A landlord s rights of re-entry is proprietary no less than his ownership of the land and a mortgagee s right of sale no less then the debt secured

Distinction between

Proprietary Rights	Personal Rights
(a) Have *money value*	(a) Not so
(b) They constitute the elements of a man s *wealth*	(b) Constitute elements of a man's *well being*
(c) Possess both economic *and* juridical significance	(c) Possess juridical significance *only*
(d) Are inheritable	(d) Are not inheritable

Explain fully the distinction between Personal and proprietary rights

B U Oct 1921
Apr 1930
1934

"The essential nature of the distinction between proprietary and personal rights lies in the fact that (i) proprietary rights are *valuable*, and personal rights are not (ii) The former are the elements of a man's *wealth*, the latter are merely elements of his *well being* (iii) The former possess not merely *juridical* but also *economic* significance, while the latter possess *juridical* significance only "

3 Inheritable and Uninheritable

Proprietary rights are inheritable while personal rights are uninheritable State the main exceptions to this rule

B U Oct 1937

A right is inheritable if it *survives* its owner, uninheritable if it *dies* with him Proprietary rights are *inheritable*, while personal rights are *uninheritable* Personal rights are almost in all cases so intimately connected with the *personality* of him in whom they are vested, that they are not merely *divested* by death but are wholly *extinguished*

Proprietary rights are usually inheritable The exceptions, however are numerous In joint ownership the right of him who dies first is wholly destroyed and the survivor acquires an exclusive title by the *jus accrescendi* or right of survivorship

Distinguish between Estate and Status —

April 1931
Oct 1933
1935

Estate and status

The sum total of a man's personal rights constitutes his status or personal condition, as opposed to his estate Such rights are *not valuable*, they are merely elements of the person's *well being* They possess *juridical* significance only

Meaning of 'Status'

Define Status

B U Apr 1931
Oct. 1933
1935

The term 'status' has four meanings —

1 Legal condition of any kind whether personal or proprietary

Thus we speak of the status of a land owner, of a trustee and so on

2 Personal legal condition to the exclusion of proprietary relations

3 Personal capacities and incapacities

Thus we speak of the contractual capacities and incapacities of married women minors etc —

4 Principal and Accessory

Every right is capable of being affected to any extent by the existence of *other* rights and the influence thus exercised by one upon another is of *two* kinds, being either *adverse* or *beneficial* It is *adverse* when one right is *limited* or *qualified* by another vested in a *different* owner This is so in the case of servient and dominant rights It is *beneficial* when one right has *added to it* a *supplementary* right vested in the *same* owner In this case the right so *augmented* may be termed the *principal* while the one so *appurtenant* to is the accessory right

Distinguish between Principal and 'Accessory' rights
B U Apr 1931
Oct 1936

5 Positive and Negative

A positive right corresponds to a positive duty and is a right that he on whom the duty lies shall *do* some positive *act* on behalf of the person entitled A *negative right* corresponds to a negative duty, and is a right that the person bound shall *refrain* from some act which would operate to the prejudice of the person entitled

Explain positive and negative rights
B U Apr 1931
Oct 1936

Distinction between

Positive Right	Negative Right
1 Corresponds to a positive duty	1 Corresponds to a negative duty
2 *Content* —positive act	2 *Content* —forbearance or non-doing
3 Entitles the owner to an alteration of the present position to his advantage	3 It maintains the present position of things
4 *Aim* —is positive benefit	4 *Aim*—is not to be harmed
5 Is a right to receive something *more* than one already has	5 Is a right to retain what one already *has*
6 Requires the *active assistance* of other persons	6 Require only *passive acquiescence* of other person
7 *Mediate* and *indirect* relation to the object.	7 *Immediate* relation to the object
8 *Example* —Right to the money in my *debtor's* pocket	8 *Example* —Right to money in my *own* pocket

Explain and distinguish between Positive and Negative rights
B U Apr 1931
Oct 1936

6 Servient and Dominant

A right subject to an *encumbrance* may be designated as *servient*, while the encumbrance which *derogates from it*, may be contrasted as *dominant*

Write a short note on Servient and Dominant rights
B U Oct 1932

There is nothing to prevent one encumbrance from being itself subject another Thus, a tenant may grant sub-lease The right of a tenant in a case is dominant with rigard to that of the landowner, but servient w regard to that of the sublessee

Personal covenants and those running with the land

Distinguish between a personal covenant and a covenant running with the land

B U Oct 1931

In what cases is the burden of a contract made with reference to property concurrent with the property?

B U Apr 1931

It is essential to an encumbrance, that it should, in technical language of English law, *run with* the right encumbered it In other words, the *dominant and the servient rights are necessarily concurrent* By this it is meant that an encumbrance must follow the encumbered right into the hands of new owner If this is not so, there is no true encumbrance

7 Legal and Equitable

Legal rights are those which were *recognised* by the *Courts of common law Equitable* rights (otherwise called *equities*) are those which were recognised solely in the *Court of Chancery*

What changes were introduced by the Judicature Act of 1873 in the law of England?

B U Oct 1930

The Judicature Act of 1873 has not *abolished* any one of the two systems but has made them *consistent* with each other by abolishing those rules of common law which *conflicted* with the rules of equity Though now legal and equitable rights are administered by the same Courts, the distinction between them still subsists at least in *two* respects, *viz*,—

Write a short note on the following — Equitable Rights —

Write a short note on Legal and Equitable Rights

B U April 1936

1 —*In the methods of their creation and disposition* —The methods of their *creation* and *disposition* are diffefent A legal mortgage of land must be creation by *deed* but an equitable mortgage may be created by a *written agreement* or by mere *deposit of title deeds*

Explain and illustrate Equitable rights have a more precarious existence than legal rights"

B U Oct 1930

2 —*In their efficacy* —Legal rights are more *efficacious* than equitable rights *Equitable rights have a more precarious existence than legal rights* Where there are two inconsistant *legal* rights claimed *adversely* by different persons over the *same* thing the *first* in time prevails A *similar rule* applies to the competition of two inconsistent *equitable* rights But when a *legal* and an *equitable* right *conflict* the *legal* will *prevail over the equitable* even though *subsequent* to it in origin *provided* that the owner of the *legal* right acquired it for *value* and *without notice* of the prior equity

Real and Personal

Distinguish between Real' and Persona rights
B U Apr 1939

A real right corresponds to a duty imposed upon *persons in general*, a personal right corresponds to a duty imposed upon *determinate individuals* A *real right is available against the world at large a personal right is available only against particular persons*

Distinction between

Real Right	Personal Right
Cotresponds to a duty imposed on persons *in general*	1 Corresponds to a duty imposed upon *determinate* individuals
Available against the *world at large*	2 Available against *particular persons* only
More valuable and more advant ageons than a persnoal right	3 Not so valuable and advanta geous as a real right
All negative	4 Mostly positive Rarely negative,
Examples	5 *Examples*
(a) My right to the peaceable occupation of my farm	(a) My right to receive rent from my tenant
(b) My right to the use of money in my purse	(b) My right to receive money from my debtor
(c) Right to liberty and reputation	(c) Right to receive compensation for fal e imprisonment or defamation
(d) The Right of a patentee	(d) The right of the purchaser of the good will of a business

Distinguish between Real rights' and 'Personal rights
B U Apr 1931
1932
1937
1939

9 Rights *in rem* and rights *in personam*

Every right involves not only a *real*, but also a *personal* relation Yet although these two relations are necessarily co existent, their relative prominence and importance are not always the same In real rights it is the real relation which stands in the forefront of the judicial conception These are, therefore, emphatically called *jus in rem* In personal rights on the other hand, it is the personal relation which is the predominant factor in the conception, and these rights are called *jus in personam*

10 Rights in re propria and rights in re

'Rights may be divided into *two* classes, *jura in re propria* and *jura in re aliena* The latter are also

Distinguish between jura in propria and jura in re aliena
B U Oct 1921
April 1923
1936
1938

A right *in re aliena* is one which *limits* or *derogates from* some more general right belonging to some other person in respect of the same subject matter All other rights which are not th... limited are *jura in propria* " Salmond

Encumbrance

Define an encumbrance
B U Oct. 1936

A *jus re aliena or encumbrance* is a right which *limits* o... *derogates* from some more general right belonging to some other person in respect of the same subject-matter

Classes of encumbrances

The chief classes of encumbrances are *four* namely, Lease... Servitudes Securities, and Trusts

What are the chief encumbrances known to law?
B U Oct 1921
1936

1 A *lease* is the encumbrance of property vested i... *one* may by a right to the *possession* and *use* of ... vested in *another*

2 A *servitude* is a right to the *limited* use of a *pie... of land unaccompanied* either by the ownership or b... the possession of it for example a right of way, a... a right to the passage of light or water across adjoining land

3 A *security* is an encumbrance vested in a *creditor* over the property of his *debtor*, for the purpose of *securing the recovery of the debt*, a right, for example to retain possession of a chattel until the debt is paid

4 A *trust* is an encumbrance in which the ownership of property is limited to deal with it *for the benefit of some one else* The owner of the encumbered *property* is the *trustee* the owner of the *encumbrance* is the *beneficiary*

Ownerships and encumbrance distinguished

stinguish between nership and En abrance
B U Oct. 1930

The owner of a right is he in whom the *right itself* is vested while the encumbrancer of it is he in whom is vested not the right itself but some *adverse dominant* and *limiting right* in respect of it A may be the *owner* of property B the *lessee* of it Although encumbrance is thus opposed to ownership every encumbrancer is never the less himself the owner of the *encumbrance* Thus lessee of the land is the *owner* of the *lease*

PART V

THE LAW OF PROPERTY

CHAPTER I

THE LAW OF PROPERTY

Property' defined

This term possesses different meanings these are the following —

Explain fully the term 'Property'
B U Apr 1935

1 All Legal Rights —It includes a person's legal rights, of whatever description A man's property is *all* that is his in law

2 Proprietary Rights —It includes not *all* rights, but only a man's *proprietary* as oppsed to his *personal* rights

3 Proprietary Rights In Rem —Thirdly, the term 'property' includes not even *all* proprietary rights but only those which are both *proprietary* and *real*

4 Corporeal Property —This term includes nothing more than *corporeal* property,—the right of ownership in a *material object*

KINDS OF PROPERTY—

Property is of four kinds —

1 Corporeal and incorporeal

All property is either *corporeal* or *incorporeal* Corporeal property is the right of ownership in *material* things, incorporeal property is any *other* proprietary right in rem Incorporeal property is itself of *two* kinds, namely (1) *jura in re aliena* encumbrances whether over *material* or *immaterial* things (2) *jura in re propria* over *immaterial* things e g *res corporalis* and *res incorporalis* corporeal and incorporeal This is a distinction of things as the objects of rights A corporeal thing (*res corporalis*) is the material subject of a proprietary ownership Thus if I own a field and have a right over another my *field* is a *res corporalis* and the subject matter of my right is *res incorporalis*

Write a short note on Legal and Equitable rights
B U

2, Moveable and immoveable

Among *material* things, important distinction is that between *moveables* and *immoveables* or, to use terms more familiar in English law, between *chattels* and *land*

To which class of property do the following belong —(a) A wall on land built of stones unfixed by mortar or foundation (b) Machinery fixed to the floor of a factory (c) Money buried in the ground (d) Gold in an unworked mine
B U Apr 1928

Illustrations

(*a*) Thus a wall on land built of stones unfixed by mortar or foundation is immoveable property So is *(d)* gold in an unworked mine *(b)* Machinery fixed to the floor of the earth would be immoveable property if the intention of the fixer is to annex it permanently to land If the requisite intention of permanent annexations is absent then mere fixation would not suffice and it would be moveable property *(c)* Money buried in the ground is moveable property

3 Proprietary rights in immaterial things

As stated above the property over which a right is exercised may be a *material* or an *immaterial* thing Many immaterial things are after the product of human skill and labour and the law recognises them

Give examples of the various kinds of immaterial forms of Property
B U Apr 1930

These immaterial forms of property are of *five* chief kinds —

1 Patents The subject matter of a patent right is an *invention*

2 Literary Copyright —The subject matter of this right is the literary *expression* of facts or thoughts

3 Artistic Copyright —

Artistic design in all its various forms such as drawing painting, sculpture and photography, is the subject matter of a right of exclusive use analogous to literary copyright

4 Musical and dramatic copyright and lastly

5 Commercial Good will Trade marks and Trade names

Give the various kinds of Jura in re aliena
B U Oct. 1920
1932
1936
1939

4 Rights in re aliena (Encumbrances)

A right in *re aliena* or *encumbrance* is one which *limits* or *derogates* from some more general right belonging to some *other*

person in respect of the *same* subject matter The chief classes of encumbrances are *four* in number namely (1) *Leases* (2) *Servitudes*, (3) *Securities*, and (4) *Trusts*

1 Lease

A lease is that form of encumbrance which consists in a right to the possession and use of property owned by some other person It is the outcome of the rightful separation of *ownership* and *possession*

Write a short note on Lease
B U Apr 1929 1934

2. Servitude

A *servitude* is that form of encumbrance which consists in a right to the *limited* use of a piece of land *without* the *possession* of it, for example a right of *way* over it

What is a servitude? Explain its nature and essential characteristic
B U Apr 1934 1943

Kinds of Servitudes—

(a) Servitude appurtenant

Servitudes are further distinguishable in the language of English law as being either *appurtenant* or *in gross* *A servitude appurtenant* is one which is not *merely* an encumbrance of one piece of land, but is also *accessory to another piece it is a right of using one piece for the benefit of another*, as in the case of a right of support for a building The land which is *burdened* with such servitude is called the *servient tenement*, that which has the *benefit* of it is called the *dominant tenement* A servitude exists over *land only* as it readily admits of non possessory uses, and runs with each of the tenements into the hands of successive owners and occupiers

Explain—'Servitude appurtenant' 'Servitude in gross'
B U Apr 1927 1937 Oct 1939

(b) Servitude in gross

A *servitude in gross* is one which is *not* so attached and accessory to any dominant tenement for whose benefit it exists a public right of way or of navigation are examples

Lease and Servitude distinguished

Distinguish between 'Leases' and Servitudes
B U Apr 1936

"It is an essential characteristic of a servitude that it *does not involve the possession of the land over which it exists* This

b) Mortgage

A *mortgage*, on the contrary, is a right which is in its own nature *an independent or principal right* and not a mere security for another right

Difference between

Motgage	Lien
(1) It is an *independent* and principal right and not a mere *security*	(1) It is only a *security* for a debt e g right to *retain possession* of a chattel until payment or right to *receive payment* out of a certain fund
(2) Right of mortgagee is vested in him *conditionally* and by way of *security* only	(2) Right of lienee is vested in him *absolutely* and *not* merely as security
(3) Is created either by *transfer* or by *encumbrance*	(3) Is created by way of *encumbrance only*
(4) *Right of redemption* is an infallible test of a mortgage	(4) There is nothing to *redeem* It is merely the *shadow* of the debt cast on the property
(5) Encumbrance is created *independent* of the debt	(5) Its duration is *dependent on* and *coincident with* the debt secured e g pledge, vendor's lien
(6) In a mortgage by way of transfer the debtor is the *beneficial* or *equitable* owner The right to re-conveyance is more than a *personal* right of the debtor	(6) Leaves the *full legal and equitable ownership* in the debtor, but vests in the creditor such rights and powers (e g sale possession etc) as are required according to the *nature* of the subject matter to give the creditor sufficient protection
(7) There is a *double ownership* of mortgaged property the mortgagee being merely a *trustee* for the mortgagor on the extinction of the debt	(7) Lien lapses *ipso jure* with the discharge of the debt secured

Distinguish between a mortgage and a lien in their fundamental aspects as two forms of encumbrances Give examples

B U Apr 1926
1927
Oct 1930
933

Lien and Easement distinguished

1 An *easement* is that form of encumbrance which consists in a right to the *limited* use of piece of land or immoveable property *without* the possession of it for example, a right of

Explain Easement

B U Apr 1927
Oct 1932
1936
1939

is the difference between a servitude and a lease A lease of land is the rightful *possession and use without the ownership of it*, while a servitude over land is the *rightful use without* either the ownership or possession of it " MOYLE

Concurrent encumbrances

It is essential to an encumbrance that it should *run with* the right encumbered by it In other words, *the dominant and servient right are necessarily concurrent* Concurrence, however, may exist in different degrees, it may be more or less *perfect* or *absolute* The encumbrance may run with the servient right into the hands of *some* of the successive owners and not into the hands of others In particular, encumbrance may be concurrent either in *law* or merely in *equity* In the latter case the concurrence is *imperfect* or *partial* Since it does not prevail against the kind of owner known in the language of the law as the purchaser for value without notice of the dominant right Examples of encumbrances running with their servient right at law are *easements leases*, and *legal mortgages* On the other hand an agreement *for* a lease an *equitable* mortgage, a *restrictive covenant* as to the use of land, and a *trust*, will run with their respective servient rights *in equity* but not *at law*

3 *Securities*

A security is an encumbrance the purpose of which is to ensure or facilitate the fulfilment or enjoyment of *some other right* (usually, though not necessarily a debt) vested in some person

Securities over property are of two kinds, which may be distinguished as *mortgages* or *liens*

Two kinds of securities—

(a) *Lien*

A *lien* is a right which is *in its own nature a security* for a debt and nothing more, for example, a right to retain possession of a chattel until payment A lien may be possessory

Possessory lien consists in the *right to retain possession* of chattles or other property of the debtor Examples are pledges of chattles and the liens of innkeepers and vendors of good

) Mortgage

A *mortgage*, on the contrary, is a right which is in its own ature *an independent or principal right* and not a mere security r another right

Difference between

Mortgage	Lien
) It is an *independent* and principal right and not a mere *security*	*(1)* It is only a *security* for a debt e g right to *retain possession* of a chattel until payment or right to *receive payment* out of a certain fund
Right of mortgagee is vested in him *conditionally* and by way of *security* only	*(2)* Right of lienee is vested in him *absolutely* and *not* merely as security
) Is created either by *transfer* or by *encumbrance*	*(3)* Is created by way of *encumbrance only*
) *Right of redemption* is an infallible test of a mortgage	*(4)* There is nothing to '*redeem*' It is merely the *shadow* of the debt cast on the property
) Encumbrance is created *independent* of the debt	*(5)* Its duration is *dependent on* and *coincident with* the debt secured e g pledge, vendor's lien
) In a mortgage by way of transfer, the debtor is the *beneficial* or *equitable* owner The right to re-conveyance is more than a *personal* right of the debtor	*(6)* Leaves the *full legal and equitable ownership* in the debtor, but vests in the creditor such rights and powers (e g sale, possession etc) as are required according to the *nature* of the subject matter to give the creaditor sufficient protection
) There is a *double ownership* of mortgaged property, the mortgagee being merely a *trustee* for the mortgagor on the extinction of the debt	*(7)* Lien lapses *ipso jure* with the discharge of the debt secured

Distinguish between a mortgage and a lien in their fundamental aspects as two forms of encumbrances Give examples

B U Apr 1926
1927
Oct 1930
1933

ien and Easement distinguished

1 An *easement* is that form of encumbrance which consists a right to the *limited* use of piece of land or immoveable roperty *without* the possession of it for example, a right of

Explain Easement

B U Apr 1927
Oct 1932
1936
19..

is the difference between a servitude and a lease A lease of land is the rightful *possession and use without the ownership of it*, while a servitude over land is the *rightful use without* either the ownership or possession of it " MOYLE

Concurrent encumbrances

It is essential to an encumbrance that it should *run with* the right encumbered by it In other words, *the dominant and servient right are necessarily concurrent* Concurrence, however may exist in different degrees, it may be more or less *perfect* o *absolute* The encumbrance may run with the servient right into the hands of *some* of the successive owners and not into the hands of others In particular, encumbrance may be concurrent either in *law* or merely in *equity* In the latter case the concurrence is *imperfect* or *partial* Since it does not prevail against the kind of owner known in the language of the law as the purchaser for value without notice of the dominant right. Examples of encumbrances running with their servient right at law are *easements*, *leases* and *legal mortgages* On the other hand, an agreement *for* a lease an *equitable* mortgage, a *restrictive covenant* as to the use of land, and a *trust*, will run with their respective servient rights *in equity*, but not *at law*

3 Securities

A security is an encumbrance the purpose of which is to ensure or facilitate the fulfilment or enjoyment of *some other right* (usually, though not necessarily a debt) vested in some person

Securities over property are of two kinds, which may be distinguished as *mortgages* or *liens*

Two kinds of securities—

(*a*) *Lien*

A *lien* is a right which is *in its own nature a security* for a debt and nothing more, for example a right to retain possession of a chattel until payment A lien may be possessory

Possessory lien consists in the *right to retain possession* of chattles or other property of the debtor Examples are pledges of chattles and the liens of innkeepers and vendors of goods

Mortgage

A *mortgage*, on the contrary, is a right which is in its own sure *an independent or principal right* and not a mere security another right

Difference between

Mortgage	Lien
It is an *independent* and principal right and not a mere *security*	(1) It is only a *security* for a debt e g right to *retain possession* of a chattel until payment or right to *receive payment* out of a certain fund
Right of mortgagee is vested in him *conditionally* and by way of *security* only	(2) Right of lienee is vested in him *absolutely* and *not* merely as security
Is created either by *transfer* or by *encumbrance*	(3) Is created by way of *encumbrance only*
Right of redemption is an infallible test of a mortgage	(4) There is nothing to 'redeem' It is merely the *shadow* of the debt cast on the property
Encumbrance is created *independent* of the debt	(5) Its duration is *dependent on* and *coincident with* the debt secured e g pledge vendor's lien
In a mortgage by way of transfer, the debtor is the *beneficial* or *equitable* owner The right to re-conveyance is more than a *personal* right of the debtor	(6) Leaves the *full legal and equitable ownership* in the debtor but vests in the creditor such rights and powers (e g sale, possession etc) as are required according to the *nature* of the subject matter to give the creditor sufficient protection
There is a *double ownership* of mortgaged property, the mortgagee being merely a *trustee* for the mortgagor on the extinction of the debt	(7) Lien lapses *ipso jure* with the discharge of the debt secured

Distinguish between a mortgage and a lien in their fundamental aspects as two forms of encumbrances Give examples

B U Apr 1926
1927
Oct 1930
1933

n and Easement distinguished

Explain Easement.
B U

1 An *easement* is that form of encumbrance which consists a right to the *limited* use of piece of land or immovable operty *without* the possession of it for example, a right of

way over it, a right to the passage of light across it to windows of a house on the adjoining land, a right to de support from it etc

An easement, in its strictest sense, *means a particular k of servitude, namely a private and appurtenant servitude* whic not a right to *take any profit* from the servient land Thu right of *way* or of *light* or to *support* is an easement An ea ment is a right to do something *on*, *in*, or *in respect of* servient land, or to *prevent* the owner of the land from do something *on in* or *in respect of* his *own* land

Distinguish between an easement and a lien
B U Apr 1931

A *lien* is an encumbrance the purpose of which is to *ens or facilitate the fulfilment or enjoyment of some other right* (usu though not a debt) *vested in the same person*

2 An *easement* therefore pertains to *immoveable* prope *only*, whereas a *lien* may pertain both to *moveable and immove* property

3 A lien can be created by *act of parties or by operatio law* whereas an easement can be created by *prescription agreement* only

4 A lien cannot *survive* the debt secured it ceases a determines *ipso facto* on the *extinction* of the debt An easem *survives* the servient property and cannot be extinguished unl the two are *merged* together in the eye of law

Profit a prendre

Explain— Profit a prendre
B U Apr 1927
1934
Oct. 1935

A *profit a prendre* is a right to *take* something *e g*, to d clay or to pasture cattle from the servient land The distinctio between an easement and a profit a prendre lies in this th *there cannot be an easement to take something from the serv land* Again an easement must always be *appurtenant* while profit a prendre may be either *appurtenant or in gross*

Charge

Explain — Charge
L. U Oct. 1933

A 'Charge' consist in *the right of a creditor to recei payment out of some specific fund or out of the proceeds of th realisation of specific property* The fund or property is said t be '*charged*' with the debt which is the debt which is the payable *out of it*

les of acquiring rights

Of the various existing modes of acquiring property *four* of primary importance They are—(1) *Possession,* (2) *scription,* (3) *Agreement* and (4) *Inheritance*

Possession

By possessing a material object the owner may acquire a l title to it in two ways—

By occupation

When property of which possession is taken by the claimant, *not as yet belong to any one else (res nullius* as the Romans) the possessor acquires a title good against all the world s mode of acquisition is known in Roman law as *occupatio*

State and explain the various legal modes of acquiring proprietary right in rem —
B U Oct 1920
Mar 1922
Apr 19..

By possessary ownership

When the thing of which possession is taken is *already* the perty of some one, the title acquired by possession is good ainst all *third* persons but is of *no validity at all* against the e *owner*

nullius

Res nullius means a thing belonging to *no one* or thing pable of ownership but *not actually owned* at the time The l of the sea and the fowls of the air *(res nullius)* belong by solute title to him who *first* obtains possession of them

Write a short note on Res nullius
B U Oct. 1920

Prescription

Prescription may be defined as ' *the effect of lapse of time in ating and destroying rights, it is the operation of time as a itive fact* "

Explain 'Prescription'
B U Mar 1920
Oct. 1923
1927

itive and Negative prescription

' Prescription is of *two kinds,* viz , (i) positive or acqui ive, (ii) negative or extinctive The former is the *creation* a right, the latter is the *destruction* of one, by the lapse time

Distinguish between positive and negative prescriptions
B. U April
Oct

Positive prescription is the *investitive* operation of lapse time *with* possession, while negative prescription is the *divestitive* operation of lapse of time *without* possession Long *possession creates* rights and long *want* of possession *destroys* them For example, if I possess a piece of land for 20 years I become the owner of it In both forms of prescription, fact and right possession and ownership tend to coincidence *Ex facto oritur jus* "If the root of fact is destroyed the right growing out of it withers and dies *in course of time* If the fact is present, the right will, *in the fulness of time*, proceed from it" Salmond

If the root of fact is destroyed the right growing out of it withers and dies in course of time If the fact is present the right will in the fulness of time proceed from it Discuss

B U Apr 1926

Negative prescription is perfect or imperfect

Negative prescription is of *two* kinds, *perfect* and *imperfect* Perfect prescription is the *destruction* of the *principal right itself* while imperfect prescription is merely the destruction of the *accessory right of action* the principal right remaining in existence

An example of *perfect* prescription is the destruction of the ownership of lands through dispossession for a certain number of years An example of *imperfect* prescription is that of a creditor losing his *right of action* for the debt but not the *debt itself owing to his failure to sue* for it *within a prescribed number of years*

Basis of prescription

"The rational basis of prescription" Says Salmond, "is to be found in *the presumption of the coincidence of possession and ownership, of fact and right* That a thing is *possessed de facto* is evidence that it is *owned de jure* That it is not *possessed* raises a presumption that it is not *owned* either If therefore I am in possession of anything in which I claim a right I have evidence of my right which differs from all other *evidence* inasmuch as it grows *stronger* instead of weaker with the lapse of time Here, then is the chief foundation of the law of prescription For in this case the law has deemed it *expedient* to confer upon a certain species of evidence *conclusive* force Whoever wishes to dispute this presumption must do so *within* that period otherwise his right, (if he has one) will be *forfeited* as a *penalty* for his neglect *Vigilantibus jura subveniunt* the law is meant for those who slumber and sleep"

What is the rational basis of prescription

B U Oct 19[illegible]

State the reasons underlying the recognition of prescription as a restitutive fact

L U Oct 1931

NOTE—

Prescription runs in favour of the immediate as against the mediate possessor but in favour of the mediate possessor as against third persons

A title by prescription is based on long and continuous possession But he who desires to acquire ownership in this way need not retain the *immediate* possession of the thing He may let his land to a tenant for a term of years and his possession will remain unaffected, and prescription will continue to run in his favour But let us suppose, for example, that possession *for twenty years will in all cases give a good title to land* and that A takes *wrongful* possession of land from X, holds it for ten years, and then allows B to have the gratuitous use of it as tenant at will In ten years more A will have good title as against X for as against *him* A has been continuously in possession But yet in another ten years B the tenant will have a good title as against his *landlord* A for as between the two the possession has been for twenty years in B To put the matter in general form —*prescription runs in favour of the immediate against the mediate possessor but in favour of the mediate possessor as against third persons*

Explain Prescription runs in favour of the immediate as against the mediate possessor but in favour of the mediate possessor as against third persons'

B U Apr 1931 1933

Thus A takes wrongful possession of land from X in 1890 and holds it till 1902 and then allows B to have gratuitous use of it as tenant at will 192 If the period of prescription is twenty years to whom does the land belong in 1905 1910 and 1913? As the land belongs to A as against X, for as against *him* A has been continuously in possession for more than twenty years But in 1913 period of prescription is twenty years and the period from 1890 to 1905 is only 15 years, the land belongs in 1905 to X as against A In 1910 B the tenant will have a good title to the land as against his landlord A for as between these two the possession has been for twenty years in B The general rule on the point is that prescription runs in favour of the immediate against the mediate possessor but in favour of the mediate possessor as against the third persons

A takes wrongful possession of land etc (See opposite Example) To whom does the land belong in 1905 1913 and 1919?

B U Oct 1923

3 Agreement

The third method in which proprietary rights are acquired is by *agreement* Agreement is of two kinds *assignment* and *grant* By the former, existing rights are *transferred* from *one* owner to *another*, by the latter *new* rights are created by way of *encumbrance* upon the *existing* rights of the grantor

Nemo dat quod non habet

'It is a leading principle of law" says Salmond, "that the title of a grantee or assignee cannot be better than that of his grantor or assignor The *exceptions* to this principle are of *two* kinds (1) Those due to the separation of *legal* from *equitable* ownership and (2) Those due of the separation of *ownership* from *possession*

What are the exceptions to the legal maxim—Nemo dat quod non habet (no one can give that which he has not)?

B U Aug 1931

(1) As an example of the first kind we may note the prine that a *trustee*, who is a *legal* owner, can give an *encumb* title to a third person, provided that that person gives *valu* what he gets and has at the time no *knowledge* of the existenc the trust This rule is known as the *equitable doctrine of pure for value without notice* To this extent a legal owner can tran to another *more* than he has himself, notwithstanding maxim *nemo dat quod non habet*

Examine the following statement–No man can give a better title that which he himself has

B U Oct 1934 19 2

(2) In the second kind are included cases in which *possession* of a thing is in *one* per on and the *ownership* of i *another* In such a case the possessor is in certain cases ena to give a good title to one who deals with him *in good f believing him to be the owner* The most notable example is case of *negotiable instruments* The posses or of a bank note : have no title to it, he may have *found* it but he can give g title to any one who takes it from him *for value* and *good faith* ''

4 Inheritance

In respect of the death of their owner, all rights are divis n to two classes being either *inheritable* or *uninheritable* right is *inheritable* if it *survives* the owner, *uninheritable* i *dies* with him *Proprietary* rights are usually *inherita personal* rights are *not* save in exceptional cases

CHAPTER II

OWNERSHIP

Defin 'Ownership State the essential element involved in that legal concept
I U Mar 1920
Apr 1937
1952
Oct 1942

Definition

Ownership is "the relation between a person and any right that is vested in him" That which a man owns is in *all* cases, *right* When we speak of the ownership of a material object, his is merely a conventional figure of speech To own a piece f land means, in truth to own a particular kind of *right* in he land

State the different kinds of ownership with examples
I U Mar 1922
Apr 1937
Oct 1942

ts kinds—

Ownership is of *six* kinds—

Corporeal and Incorporeal

Destinguish between corporeal and incorporeal ownership
L U Apr 19 0
Oct 19..

Corporeal ownership is the ownership of a *material object* *Incorporeal* ownership is the ownership of a *right*

The true subject matter of ownership is in all cases a *right* When we speak about a man as owning a field 'field' is a convenient expression for the multitude of rights which he owns in the field The rights are identified with the material object Thus, the distinction between corporeal and incorporeal ownership is based on a *usage of speech for reasons of convenience*

When the rights owned are identified by a figure of speech with a *material object*, ownership is said to be *corporeal* ownership When the rights *cannot* be so identified the ownership is *incorporeal*

Explain with illustrations the trust and beneficial ownership
B U Oct 19..

2. Trust and Beneficial

Trust ownership is an instance of *duplicate ownership* Trust property is that which is owned by *two* persons at the same time, *the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit* of *the other* The former is called the *trustee* and his ownership is *trust ownership*, the latter is called the *beneficiary* and his ownership is *beneficial ownership* The ownership of the trustee is *infact*, nominal, not real In *law*, however the trustee *represents* his beneficiary

As between *trustee* and *beneficiary*, the property belongs to the latter not to the former But as between the *trustee and third persons*, owner of the trustee is complete and absolute He is clothed with the rights o beneficiary, and is so enabled to personate or represent him in dealings the world at large

Object of appointing trustees

How do you justify on the ground of ut lity the existence of the doctrine of trusts?
B U Apr 1927 1932

The purpose of trusteeship is to protect the rights interests of persons who for any reason are *unable* effectu to protect them for themselves Persons for whose trustee is ordinarily needed are (i) the unborn, (ii) infants (iii) lunat and (iv) persons having *conflicting interests* in the *same* prope for example, an owner and an encumbrancer

Trust' and Contract'

Distinguish trust from contractual obligation
B U Apr 1931

Trust is to be distinguished from a mere contrac *obligation to deal with one's property on behalf of some one* A trust is *more* than an obligation to use one's property for benefit of another it is an obligation to use it *for the benef another* in whom it is already concurrently vested The b ficiary has more than a *personal* right against his trustee in performance of the obligation of the trust He is himself *owner* of the trust property

Trust' and Agency'

Di tinguish a trust from agency
B U Apr 1931

Trust is also to be distinguished from the relation in wh an *agent* stands towards the property which he administers *behalf* of his *principal* In agency the property is vested *so* in the principal but in trusteeship it is vested in the trus himself, *no less than in the beneficiary*

A trustee is an agent for the administration of property Illustrate your answer with examples
B U Apr 1927

The trustee like an agent is destitute of any right of beneficial enjoym of the trust property If we therefore look to the *essence* of the matter above definition is correct but in *form* and legal *theory* a trustee is n *mere agent* but an *owner* In agency the property is vested *solely* in the per on who e behalf the agent acts but in trusteeship it is vested in the trus himself no le s than in the beneficiary

3 Vested and Contingent

Define and distinguish between Vested ownership and Contingent ownership
B U Apr 1930
Oct 1932
Apr 1934
Oct 1936
Apr 1938
Oct. 1942

Ownership is either *vested* or *contingent* It is *vested* wh the owner's *title* is already *perfect* it is *contingent* when his ti is *yet imperfect* but is *capable* of being perfect *on the fulfilme of some condition* In the former case he owns the rig *absolutely* in the latter, he owns it merely *conditionally*

ıcnership of an unborn person—

There is nothing in law to prevent a man from owning property *before* he born. His ownership is necessarily *contingent*, indeed for he may never be orn at all, but it is none the less *real* and *present* ownership A man, nerefore may validly settle his property upon his wife for children *to be born* f her Yet the law has put various restrictions lest property should be too ong withdrawn in this way from the u es of living men in favour of enerations yet to come

A settles his property upon his wife for the children to be born of her, Is the settlement valid?
(Ans Yes)
B U Oct 1928

'ondition Precedent and Condition Subsequent

The conditions on which contingent ownership depends are ermed conditions *precedent* to distinguish them from conditions *ubsequent* "A *condition precedent* is one by the fulfilment of rhich an *inchoate or incomplete title is completed*, a *condition ubsequent* is one on the fulfilment of which a title *already ompleted* is *extinguished* In the *former* case a man *acquires bsolutely* what he has already acquired *conditionally* In the *atter* case a man *loses absolutely* what he has already *lost 'onditionally*" Note that ownership subject to a condition ub equent, is not contingent but *vested*, a contingent wnership, however, is that which is not yet vested, but may ecome o in the future, while ownership subject to a condition is already *vested*, but may be *divested* in the future such wnership is not contingent but *determinable*

Define and distinguish between — Condition precedent and Condition subsequent
B U Oct 1935
1937
Apr 1939
Oct 1942

Write a short note on the following — Ownership subject to a condition precedent and Ownership subject to a condition subsequent
B U Apr 1933
Oct 1942

Legal and Equitable

Legal ownership is that which has its origin in the rules of *common law*, while equitable ownership is that which proceeds from *rules of equity* divergent from the common law

Explain and illustrate the distinction between legal ownership and equitable ownership
B U Oct 1932
1933
Apr 1943

NOTE—*The equitable ownership of a legal right is a different thing from the ownership of an equitable right* Law and equity are discordant not merely as to the *existence* of rights but also as to the *ownership* of the rights which they both recognise When a debt is verbally assigned by A to B A remains the legal owner of it none-the-less but B becomes the equitable owner of it But there are not for that reason *two* debts, there is only one as before though it has now two owners The thing which B thus equitably owns is a legal right which is at the same time legally owned by A Similarly the ownership of an equitable mortgage is a different thing from the equitable ownership of a legal mortgage

Explain and illustrate The equitable ownership of a legal right is a different thing from the ownership of an equitable right"
B U Oct. 1930

5 Sole ownership and Co-ownership

Define and distinguish between Sole Ownership and Co Ownership

B U Apr 1930
Oct 1937

Ordinarily a right is owned by *one* person only at a t but *duplicate* ownership is perfectly possible *Two* or persons may, however have the *same* right vested in t This may happen in several ways but the simplest case is of *co ownership* The right is an *undivided* unity Co owne may be dissolved into sole ownership of parts of the who the process known as *partition*

6 Co-ownership and Joint ownership

Distinguish between 'Co ownership' (or ownership in common) and Joint ownership

B U Apr 1931
1933

'Co ownership may assume different forms Its two kinds in English law are distinguished as *ownership in co* and *joint ownership* The most important difference bet these relates to the effect of the *death* of one of the co ow In *ownership in common* the right of a dead man *descends t successors* like any other inheritable right But on the dea one of two *joint* owners his ownership *dies* with him an *survivor* becomes the *sole* owner by virtue of this rig survivorship or *jus accrescendi*" Salmond

CHAPTER III

POSSESSION

conception

"In the whole range of legal theory there is no conception more cult than that of possession"

Discuss
In the whole range of legal theory there is no conception more difficult than that of possession' Salmond
B U Oct 1923
Apr 1929
Oct 1939

Not is the question one of mere curiosity or scientific rest, for its practical importance is not less than its difficulty *legal consequences which flow from the acquisition and loss of session are many and serious* Possession, for example, is lence of ownership the *possessor* of a thing is presumed to the *owner* of it, and may put all other claimants to proof of ir title Long possession is a sufficient title even to property ich originally belonged to another The transfer of possession one of the chief methods of transferring *ownership* The *first session* of a thing which as yet belongs to no one is a good e of right Even in respect of property already owned the ongful possession of it is a good title for the wrongdoer, as inst all the world *except* the owner Possession is of such icacy, also, that a possessor may in many cases confer a good le on another even though he has none himself as when I ture in good faith and for value a banknote from a thief or ods from a factor who disposes of them in fraud of his ncipal

Explain the generic conception of possession
B U Oct 1923
Apr 1929

importance

The following are the serious legal consequences which ow from the acquisition and loss of possession —

Mention some of the legal consequences arising from the acquisition and loss of possession
B U Mar 1920
Apr 1928
1929

1 Possession is *prima facie* evidence of *title* of ownership

2 Long *adverse possssssion* confers title even to property which originally belonged to another

3 Transfer of possession is one of the chief modes of transferring ownership

4 The first possession of a thing which as yet belongs to no one *(res nullius)* is a good title of right

Discuss the various advantages of possession
B U Oct 1929

5 Even in respect of property already owned, the wrongful possession of it is a good title for the wrongdoer, against all the world *except* the true owner

6 Possession is of such efficacy, also, that a possessor may in many cases confer a good title on another even though he has none himself

These are some of the results which the law attributes to possession

Its essentials

The possession of a material object is *the continuing exercise of a claim to the exclusive use of it* It involves *two distinct elements*, one of which is *mental* or *subjective* the other *physical* or *objective* These were distinguished by the Roman lawyers as *animus* and *corpus* The subjective element is called more particularly *animus possidendi*, or *animus domini*

'Neither of these,'' says Salmond 'is sufficient by itself Possession begins only with their union and lasts only until one or the other of them disappears ''

Animus possidendi

Write a short note on —Animus Possidendi
B U Apr 1936
Oct 1935

Animus possidendi or the subjective element is *the intent to appropriate to oneself the exclusive use of the thing possessed* It is an exclusive claim to a material object It is a purpose of using the thing oneself and of excluding the interference of other persons

The *corpus* without *animus* is ineffective I may be alone in a room with money that does not belong to me lying ready to my hand on the table I have absolute physical power over this money I can take it away with me if I please but I have no possession of it for I have no such purpose with respect to it

What are the essential elements involved in the conception of Possession ? Fully illustrate your answer with examples
B U Mar 1921
Oct. 1921
1927
1933
Apr 1933
1935
Oct 1936
Apr 1943

As to the nature of *animus* or mental attitude of the possessor the following points are noteworthy —

(1) *The intent or claim need not be rightful*

(2) *The claim of the possessor must be exclusive, that is to say* there should be an intent on the part of the possessor to exclude other persons from the uses of the thing possessed The exclusion however need not be absolute

(3) *The animus possidendi need not amount to a claim or intent to use the thing as owner*

Write a short note on —Animus Possidendi
B U Apr 1936
Oct 1938

(4) *The animus possidendi need not be a claim on one's own behalf* The person may possess a thing on account of another, *e g*, as a trustee, or agent, or servant

(5) *The animus possidendi need not be specific but may be merely general* Thus I may possess all the books in my library even though I may have forgotten the existence of many of them

2—Corpus

To constitute possession the *animus domini* is not in itself sufficient, but must be embodied in a *corpus*

Corpus is the effective realisation in fact of the claim of the possessor Effective realisation means that the facts must amount to the actual present exclusion of all alien interference with the thing possessed, together with a reasonably sufficient security of the exclusive use of it in the future

Example—

A parcel of bank notes was dropped on the floor of A s shop where they were found by B, a customer Can A or I claim the notes? Here A had no possession in law of those bank notes Possession requires the concurrence of the two elements animus or the intention of the possessor with respect to the thing possessed, and corpus or the external facts in which this intention has realised embodied or fulfilled itself Neither of these is sufficient *by itself* No mere *intention* to appropriate a thing will amount to the possession of it Possession begins only with the *union* of these two elements In this case A had not the necessary animus for he did not know of the existence of the parcel s all although he might have had the corpus they having been dropped in his shop See *Bridges v Hawkesworth* 21 L J Q B 75

A parcel of bank notes was dropped on the floor of A s shop where they were found by L a customer Had A possession in law of the notes when E discovered them? Give your reasons
B U Mar 1921
Oct 1925
Apr 1928

"The general principle is that the first finder of a thing has a good title to it against all but the true owner, even though the thing is found on the property of another person" The general principal enunciated above is true both in law and in fact and is well illustrated in *Bridges v Hawkesworth* In this case a parcel of banknotes was dropped on the floor of the defendant's shop, where they were found by the plaintiff a customer It was held that the plaintiff had a good title to them

Comment upon
'The general principle is that the first finder of a thing has a good title to it against all but the true owner, even though the thing is found on the property of another person'

Enumerate with illustrations the principal exceptions to the above rule

B U Oct 1929

as against the defendant For the plaintiff and not the defendant was the first to acquire possession of them, the defendant had not the necessary animus, for he did not know of their existence This principle is, however, subject to important exceptions, in which owing to the special circumstances of the case the better right is in him on whose property the thing is found *The chief of these exceptional cases are the following* —

1 When he on whose property the thing is found is already in possession not merely of the property, but of the thing itself, even without specific knowledge His prior possession will confer a better right as against the finder Thus if I sell a coat in the pocket of which, unknown to me there is a purse which I picked up in the street, and the purchaser of the coat finds the purse in it, it may be assumed with some confidence that I have a better right to it than he has though it does not belong to either of us

No man can give a better title than that which he himself has Discuss the above statement and state whether there are any exceptions to this rule and if so what?

B U Oct 1942

2 A second limitation of the right of a finder is that if any one finds a thing as the *servant* or *agent* of another he finds it not for himself but for his employer In *South Staffordshire Water Co V Sharman* the defendant was employed by the plaintiff company to clean out a pond upon their land, and in so doing he found certain gold rings at the bottom of it It was held that the company was in first possession of these rings, and the defendant, therefore had acquired no title to him

3 A third case in which a finder obtains no title is that in which he gets possession only through a trespass or other act of wrong doing

A company X takes a lease etc (See Example opposite) Between A and Y in whom does the possession lie?

B U Mar 1951

Examples

A company X takes a lease of a piece of land from Y for the purpose of excavating and removing the soil therefrom and for the erection of machinery thereon During the course of excavation one of the coy's men finds a Roman jar buried six feet below the surface Between X and Y in whom does the possession lie

A took a lease of land from its owner B for the purpose of erecting gas works and in the process of excavation found a prehistoric boat six feet below the surface Can B claim the boat from A? Give reasons

B U Apr 1939 1943

In this case, on the ruling laid down in a similar case *Elwes V Brigg Gas Co* we can say that X is entitled to the Roman jar as against X who discovered it Chitty J says in the above case of the plaintiff 'Being entitled to the inheritance and in lawful possession he was in possession, of the

ground, not merely of the surface, but of every thing that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat In my opinion it makes no difference in these circumstances that the plaintiff was not aware of the boat" This case, it will appear, comes in conflict with the theory of possession and the general principle cited in the preceding case But this inconsistency can be explained in the following way A finder obtains no title to thing of which he gets possession only through a *trespass* or other act of *wrong doing* If a trespasser seeks and finds treasure in my land, he must give it up to me, not because I was first in possession of it but because *he cannot be suffered to retain any advantage derived from his own wrong* Because according to the true construction of the lease the tenants though entitled to excavate and remove soil, were not entitled to remove *anything else*

A bank note was dropped in the shop of A, who on discovering it picked it up and converted it to his own use well knowing that the owner could be found A was convicted of theft Was A rightly convicted? Give reasons

L U Apr 1943

(Ans Conviction should be for criminal misappropriation and not theft)

In *South Staffordshire Water Co* v *Sharman* the defendant was employed by the plaintiff company to clean out a pond upon their land, and in doing so he found certain gold rings at the bottom of it It was held that though Sharman, the defendant, was the first to obtain possession of them, he obtained it for his employers and could claim no title for himself

Its kinds

Possession is of four kinds, These are—

1 Corporeal and Incorporeal

Corporeal possession is the possession of a *material* object *Incorporeal* possession is the possession of anything *other* than a material object Corporeal possession is termed in Roman law *possessio corporis*, Incorporeal possession is termed *possessio juris*

State with example the different kinds of possession

B U Oct 1923
1933

Corpareal and incorporeal possession compared —In both there are the same two elements, namely the *animus* and the *corpus* The *animus* is the claim the self assertive will of the possessor The *corpus* is the environment of fact in which this claim has realised embodied and fulfilled itself

In the case of corporeal possession, the actual use of *corpus possessionis not* essential In the case of *incorporeal* possession *actual continuous use and enjoyment is essential* it being the *only* possible mode of exercise

Essence of corporeal po session

Explain and com ment on the theory t at the essence of co rporeal possession is to be found in the physical power of exclusion
B U Oct 1931

According to *Savigny*, the essence of possession is to be found in the *physical power of exclusion* The *corpus possessionis* required at the commencement is the present or actual physical power of *using* the thing oneself *and* of *excluding all other persons from the use of it* Thus according to Savigny, to acquire possession of a horse I must take him by the bridle or ride upon him or have him in my *immediate presence* so that I can *prevent* all other persons from interfering with me but no such immediate physical relation is nessessary to retain the possession so acquired

What is Salmond's attitude towards the theory that the es sence of corporeal possession is to be found in the phy sical power of ex clusion ?
B U Oct 1933 1934

Salmond criticises the above mentioned view on the following grounds —

What is the true test of possession' ac cording to Salmond? How does it differ from the test laid down by Savigny?
B U Oct 1924 1934

1 He says that *even at the commencement a possessor need have no physical power of excluding other persons* —The true test, therefore according to Salmond, is *not* the physical power of *preventing* interference but the *improbability of any interference from whatever source this improbability arises*

2 *Secondly*, the theory of Savigny is inapplicable to the possession of *incorporeal things* Here there is neither *exclusion* nor the *power* of exclusion

Explain with il u strations Corporeal Possession its mea ning and nature
B U Oct 1939

2 Mediate and immediate

Possession *held by one man through another* is termed *mediate* while *that which is acquired or retained directly or personally* may be distinguished as *immediate* or *direct*

What is mediate possession and what is the relation bet ween the mediate possessor and the immediatepossessor?
B U Oct 1921

Thus if I *go my self* to purchase a book I acquire *direct* possession of it but if I send my servant to buy it for me I acquire mediate possession of it through him, until he has brought it to me when my possession becomes immediate

Kinds of mediate possession

Of mediate possession there are *three* kinds

1 The first is that which I acquire *through an agent or servant*, that is to say through some one *who holds solely on my account and claims no interest of his own*

2 The second kind of mediate possession is that in which the direct possession is in one *who holds both on my account and his own*, but who *recognises my superior right to obtain from him the direct possession wherever I choose to demand it* This is the case of a *borrower, hire,* or *tenant at will*

What are the three kinds of mediate possession with which they may be classified? Give the characteristics of each of the three kinds

B U Oct 1908

3 The third form of mediate possession is the case in which the immediate possession is in a person *who claims it for himself until some time has elapsed or some condition has been fulfilled* Securities are instances on the point

While a thief cannot on his own account possess it

B U Apr 1914

Concurrent

It was a maxim of Civil Law that two persons could not be in possession of the same thing at the same time This is true generally, for exclusiveness is of the essence of possession Two diverse claims of exclusive use cannot both be effectually realised *at the same time*

How far is it true to say that two persons cannot be in possession of the same thing at the same time?

B U Oct 1911

Hence there are several *possible cases of* duplicate possession

I Mediate and immediate possession in respect of the *same thing* as explained above

2 Two or more persons may possess the same thing in succession, just as they may own it in common

Is there any exception to the rule that two persons cannot be in possession of the same thing at the same time?

B U Oct 1911

3 Corporeal and incorporeal possession may co-exist in respect of the same material object just as corporeal and incorporeal ownership may Thus A may possess a *land* while B possesses a *right of way* over it

3 Possession may exist in law and not in fact This is what English lawyers call *constructive* possession

Modes of acquiring possession

The modes of acquisition of possession are two in number namely *Taking and Delivery*

1 Taking

What are the various modes of acquiring possession?
B U Apr 1928
Oct 19 0

Taking is the *acquisition of possession without the consent of the previous possessor* The taking of it may be either *rightful or wrongful*

2 Delivery

Delivery is the *acquisition of possession with the consent and co operation of the previous possessor* It may be *actual* or *constructive*

(a) *Actual delivery* is the transfer of *immediate possession* It is of two kinds according as the *mediate* possession is or is not retained by the transferor

(b) *Constructive delivery* is all which is not actual It is of *three kinds* —

(i) *Traditio brevi manu* —It consists in the surrender of the mediate possession of a thing to him who is *already* in immediate possession of it

Thus a friend who has borrowed a book from me, has only the immediate possession of it the mediate possession being with me If I want now to present that book to him I need not first take back its immediate possession from him and then give him the full possession by actual delivery I can effectually transfer the property in the book by merely *Surrendering to him my mediate possession* i e by asking him while it is still retained by him to keep it for himself

Give the modes of acquiring possession
P U Oct 1930

(ii) *Constitutum possessorium* It is the transfer of mediate possession while the immediate possession remain in the transferor

(iii) *Attornment* —This is the transfer of mediate possession while the immediate possession remains outstanding in some *third* person

Upon what basis of reason is it that we find in almost all systems of law that possession is protected apart from and even against ownership?

B U Oct 1931

2 A second reason for the institution of possessory remedies is to be found in the serious imperfections of the early proprietary remedies The procedure by which an owner recovered his property was cumbrous, dilatory, and inefficient.

3 The third reason of possessory remedies is the difficulty of the proof of ownership It is easy to prove that one has been in *possession* of a thing, but difficult (in the absence of any system of registration of title) to prove that one is the *owner* of it.

Burden of proof of ownership

State the cardinal rule of English law with regard burden of proof of ownership

B U April 1927

The following are the *three* rules by the operation of which English Law adjusts the burden of proof of ownership with perfect equity

1 *Prior possession is prima facie proof of title* —Even in the ordinary proprietary action a claimant need not do anything more than prove that he had an older possession than that of the defendant.

2 *A defendant is always at liberty to rebut the above presumption* by proving that the better title is in himself his being the earlier possession than plaintiff s

Give the rules of English law which make possessory remedies unnecessary

B L Oct 1930

3 *A defendant is not allowed to set up the defence of jus tertii* —that is the right of a *third* person He will not be allowed to say as between himself that *neither of the two but some third person is the true owner*

CHAPTER IV

TITLES

KINDS OF TITULAR FACTS—

Facts establishing title are of *three* kinds 1 Vestitive, 2 Investitive and 3 Divestitive

Write a short critical and explanatory note on — Vestitive Facts
B U Oct 1936
1937
Apr 1943

1 Vestitive

How does Salmond define th expression 've titive fact' ? State the different classes of vestitive facts and discuss the position they occupy in the life history of a right
B U Oct 1938
1939

A vestitive fact is one which determines, positively or negatively, the *vesting* of a right in its owner It is one which either *creates* or *destroys* or *transfers* rights

The different classes of vestitive facts correspond to the three chief events in the life history of a right, namely, its *creation*, its *extinction*, and its *transfer* Vestitive facts may be divided into (1) *Investitive facts or titles* and (2) *Divestitive facts*

What are Vestitive Facts'? Comment upon and illustrate briefly the various divisions and distinctions of Vestitive Facts
B U Apr 1932
Oct 1935

Kinds of vestitive facts

Vestitive facts are divisible into two fundamentally distinct classes according as they operate *in pursuance of the will of the persons* concerned, *or independently of it, that is to say* the creation transfer, and extinction of rights are either *voluntary* or *involuntary*

1 Acts in the law

Explain—'Acts in the law
B U Apr 1933
1937
Oct 1942

This distinction between the two classes of vestitive facts may be expressed by the contrasted expressions *acts of the party* and *acts of the law An act of the party*, technically known as *act in the law* is any expression of the will or intention of the person concerned, directed to the *creation, transfer or extinction*, of a right, such as a contract or a deed of conveyance

Acts in the law are of two kinds which may be distinguished as *unilateral* and *bilateral* In the former there is only *one* party whose will is effective, *e g* , a testamentary disposition, the exercise of a power of appointment, the avoidance of a voidable contract, *etc* The latter involves the consenting will of *two or more distinct persons*, as for example a contract, a conveyance mortgage *etc* Bilateral acts in the law are called *agreements*

Agreement as a vestitive fact

Of all vestitive facts acts in the law are the most important and among acts in the law, agreements are entitled to the chief place

State the reasons underlying the recognition of Agreements as Vestitive Facts
B U Oct 1934

The importance of agreement as a vestitive fact lies in the universality of its operation The great majority of right and duties possessed by an individual have their origin in agreements made by him with other men It may be asked for what reasons the law allows this far reaching operation to the fact of agreement Why should the mere consent of the parties be permitted to stand for a title of right? For this, says Salmond, there are *two* chief *reasons* —

1, Agreement is evidential of right

There is not ordinarily a greater sign of equal distribution of anything than that every man is contented with his share" Comment on this as a reason for enforcing agreements in law Do you know of any other reasons for giving effect to agreements in law?
B U Apr 1928

There is in general no better evidence of the justice of an arrangement then the fact that all persons whose interests are affected by it have freely and with full knowledge consented to it Men are commonly good judges of their own interests, and in the words of Hobbes, *'there is not ordinarily a greater sign of equal distribution of anything, than that every man is contented with his share"* When, therefore, all interests are satisfied, and every man is content, the law may safely presume that justice has been done, and that each has received his own

2 —Consent is in many cases truly constitutive of right

The State, so far as may be, allows a rule of right to be declared and constituted by the agreement of those concerned with it

Classify agreement as a vestitive fact
B U Apr 1931

In respect of their effects upon rights agreements are of four classes —

1 *Contracts*—creating rights *in personam*

2 *Grants*—creating rights of any other kind

3 *Assignments*—transferring rights

4 *Releases* (discharges or surrenders)—extinguishing right

(*) Act of the law

An act of the law on the other hand, is the creation extinction, or transfer of a right *by the operation of the law itself*, independently of any consent thereto on the part of the person concerned as for example the devolution of the property of a person dying intestate If a decree is passed against me by a competent court or if I am adjudged an insolvent, my goods will be taken in execution by the judgment creditor in the first case or will vest in the official assignee in the second case, *whether I will it or not*

2 Investiture (Titles)

An investitive fact also commonly called title is the *de facto* antecedent, or which the right is the *de jure* consequent In other words *every right involves a title or source from which it is derived*

Kinds of titles

Titles are of *two* kinds, being either *original* or *derivative* The former are those which *create* a right *de novo*, the latter are those which *transfer an already existing right* of a new owner The catching of fish is an original title of the right of ownership whereas the purchase of them is a derivative title

3 Divestitive

As the facts *create* rights, so they *take* them away Divestitive facts are those which either *destroy* rights or *transfer* them to some one else

Kinds of divestitive facts

These are of two kinds, viz , *extinctive* or *alienative* *They are extinctive* when they *divest* a right by completely *destroying* it The surrender of a lease to the lessor for example, divests the right of the lessee by destroying the lease and therefore it is an extinctive fact

They are alienative when they divest an owner of his right by *transferring* it to somebody else Thus the above lessee had instead of surrendering the lease, transferred it to a sub lessee such a transfer would have been an alienative fact

Derivative titles and alienative facts are merely the same facts looked at from two different points of view The transfer of a right is an event which has a double aspect It is the acquisition of a right by the transferee, and the loss of it by the transferor The vestitive fact, if considered with reference to the transferee, is a derivative title while from the point of view of the transferor it is an alienative fact Purchase is a derivative title, but sale is an alienative fact, yet they are merely two different sides of the same event

Agreements

As stated above, agreements are the best instance of acts in the law

Their kinds

What are valid, void and voidable agreements?
B U Oct 1933

Agreements are of three kinds, being either *valid*, *void*, or *voidable*

1 A *valid* agreement is one which is *fully operative* in accordance with the intention of the parties

2 A *void* agreement is one which entirely fails to receive legal recognition or sanction the parties *being wholly destitute of legal efficacy*

Distinguish between void and voidable agreements
B U Apr 1930
1937
1939

3 A *voidable* agreement is void or valid *at the election of one of the parties to it* On the exercise of this power of cancellation the agreement not only ceases to have any efficacy, but is deemed to have been void *ab initio*

When invalid?

The most important causes of invalidity according to Salmond, are six in number, namely (1) Incapacity, (2) Informality, (3) Illegality, (4) Error, (5) Coercion and (6) Want of consideration

Mention the important causes according to Salmond of the invalidity to agreements briefly discussing each of them
B U Oct 1936
1933
1936

1 *Incapacity*

Certain classes of persons are incapable of the power of determining their right and liabilities by way of consent *minors* and *lunatics* for example

2 *Illegality*

Certain agreements are, for one reason on the other declared *by law* to be invalid either as being immoral or being

gainst public policy and the like Agreements in restraint of trade are instances on the point

Briefly discuss and enumerate the important causes except want of consideration which will, according to Salmond render an agreement void or voidable
B U Oct 1926
1936

Coercion

The consent to be valid must be *free* It Must not be the outcome of compulsion *or* undue influence

Informality

Agreements are of two kinds, *simple* and *formal* A *simple* agreement is one in which nothing is required for its effective operation beyond the manifestation of the consenting *wills* of the parties A *formal* agreement, on the other hand, is one in which the law requires not merely that consent shall exist, but that it shall be manifested in some particular *form*, in default of which it is held of *no account*

Discuss the utility of formal agreements
B U Oct 1935

Error or mistake

Error or mistake which makes an agreement invalid is either *essential* or *unessential* *Essential error* is that which is of such a nature as to *prevent the existence of any real consent and therefore of any real agreement e g* if A agrees to sell land to B but A is thinking of *one* piece of land and B of *another*, the agreement is void

Discuss the effect of error on the validity of agreement
B U Apr 1930
1937
1939

Unessential error is that which relates only to some *external* circumstance serving as *one* of the inducements which led to the making of it, e g when A agrees to buy B's horse because he believes it to be sound, whereas in reality it is unsound The general rule is that *unessential* error has no effect on the validity of an agreement, unless when it has been caused by the *misrepresentation* of the other party

Want of consideration

The requirement of consideration is almost wholly confined to the *law of contract*, other forms of agreement being generally exempt from it

A *consideration* in its widest sense is the *reason motive*, or *inducement*, by which a man is moved to bind himself by an agreement It includes both *moral* and *valuable* consideration

Briefly discuss the doctrine of consideration
B U Apr 1926

The law requires *valuable* consideration as a condition of the validity of contract By valuable consideration is meant something of value given done or promised by one party in exchange for the promise of the other In English law no contract (unless under seal or of record) is binding without consideration The thing thus given, done or promised by way of consideration must be of some *value that is to say* it must be material to the interests of one or other or both of the parties

In certain exceptional cases considerations which are *not valuable* are accepted as *good* and *sufficient* by the law For example, a promise to pay the debt barred by limitation is legally valid though the consideration is moral.

Sufficiency of consideration

Comment briefly on the following—Ex nudo pacto non oritur actio
B U Oct 1931 1932

Ex nudo pacto non oritur actio In English law this maxim expresses the necessity of a legal consideration for the validity of a contract The consideration required by law is the consideration of a kind which law regards as *sufficient* It is not enough that it should be *deemed sufficient by the parties* for the law has itself authoritatively declared what facts amount to a valid and sufficient consideration for consent and what facts do not If men are moved to agreement by consideration which the law refuses to recognise as *good* so much the worse for the agreement *Ex nudo pacto non oritur actio* To bare consent supported by no inducement the law allows no operation

PART VI

PRINCIPLES OF LIABILITY

The *material* condition is the *doing of some act* by the person to be held liable The *formal* condition is the *mens rea* or *guilty mind, with which the act is done*

Comment upon — A man is responsible not for acts in themselves but for his acts coupled with the mens rea or guilty mind with which he does them
B U April 1950

Both, in fact, must concur In law, "a man is responsible not for acts in themselves, but for his acts coupled with the *mens rea* or guilty mind with which he does them" We shall therefore analyse the concepts of an 'acts' and of '*mens rea*'

'Act'

An 'act is an event which is *subject to the control of the human will*" It must consist of—*1 An origin* and *2 Its consequences*

Its kinds

Analyse the concept of an 'act'
B U Oct 1953

Acts are mainly of three kinds —

1 Internal and external

The former is an act of the *mind*, the latter is that of the *body*

2 Positive and Negative

The former is an act of *commission*, the latter pertain to *omissions*

3 Intentional and unintentional

State the various species of acts given by Salmond
B U Oct 1933

An act is *intentional* when it was *foreseen* and *desired* by the doer and this forethought and desire realised themselves in the act through the operation of the will It is *unintentional* when it is *not* the result of any determination of the *will* towards a desired issue

Its consequences or tendences

An act may be mischievous in two ways, either in its actual *results* or in its *tendencies* Hence it is that *legal* wrongs are of *two* kinds The first consists of those in which the act is *wrongful only by reason of accomplished harm which in fact ensues from it* The second consists of those in which the act is *wrongful by reason of its mischievous tendencies irrespective of the actual issue* Criminal wrongs commonly belong to this second class Hence an *unsuccessful attempt* is a ground of *criminal* liability no less than a *completed* offence As to *civil* liability, no corresponding

general principle can be laid down Hence *so far as civil liability goes, failure in a guilty endeavour amounts to innocence*

Under what circumstances and to what extent may failure in a guilty endeavour amount to innocence?
B U Oct 1925

Mens rea

The general conditions of penal liability are indicated with accuracy in the maxim—*Actus non facit reum nisi mens sit rea*—The act *alone* does not amount to guilt, unless it is accompanied by a *guilty mind* As stated above, both, the act *and* the guilty mind,—the *mens rea*, must concur to hold a person penally liable

"The *mens rea* includes *two* distinct mental attitudes of the doer towards the deed These are '*intention*' and *negligence*' Generally speaking *a man is penally responsible only for those wrongful acts which he does either wilfully or negligently*' *The mens rea* may assume one or other of two distinct forms, viz, wrongful *intention* or culpable *negligence* The offender may either have done the wrongful act *on purpose*, or he may have done it *carelessly* In either case, he will be penally liable

Write a short critical note on 'mens rea'
B U Oct 1934
1937
Apr 1938

But if his act is *neither intentional nor negligent*, there can be no good purpose fulfilled in ordinary cases by holding him liable for it

[*As regards the Exceptions to this principle of mens rea, see Chapter II below*]

A man is responsible, not for his acts *in themselves* but for his acts *coupled with mens rea* namely *wrongful intention* or *culpable negligence* A wrong is intentional only when the intention extends to all the elements of the wrong, and therefore to its circumstance no less than to its *origin* and *consequences* So far therefore, as the knowledge of the doer does not extend to any material circumstance the wrong is as to that circumstance unintentional Woman who has married again during the lifetime of her former husband *honestly* believing him to be dead has *not wilfully committed the crime of bigamy* for one of the material circumstances lies *outside* her intention She will also be not liable for *negligence* if the period of seven years had elapsed since his absence because the law *presumes* that a man *not heard of for seven years* is to be considered as *dead* The woman has *not therefore committed any offence*

A woman honestly believing her husband to be dead marries again during his lifetime What crime, if any is she guilty of?
B U Apr 1929

Theory of remedial liability

The theory of remedial liability lays down that *whenever the law creates a duty, it should enforce the specific fulfilment of it* The sole condition of the existence of remedial liability is the existence of a legal duty binding upon the defendant and unful

filled by him What a man ought to do by a *rule* of law, he is made to do by the *force* of law "In law *ought* is normally equivalent to *must* and obligation and remedial liability are in general co existent" To this general principle there are *three exceptions* —

Give the Theory of Remedial Liability and the exception to it —
B U Apr 1931

1 Duties of imperfect obligation

The breach of such a duty gives no cause of action, *that is to say* creates no liability at all A time barred debt, is a legal debt, but the payment of it cannot be compelled by any legal proceedings

In law *ought* is normally equivalent to *must* and obligation and remedial liability are in general co-existent

2 Where the duty violated is in its nature incapable of specific enforcement

Discuss this general principal and point out the exceptions if any to it
B U Oct 1938
1942

There are duties which cannot be specifically enforced, once they are broken Thus it is the duty of every one to refrain from doing anything that is likely to injure the reputation of others But once a libel on somebody is perpetrated it becomes impossible in the nature of things, to enforce specifically, on the miscreant the duty of refraining, for the simple reason that it is too late Wrongs of this nature cannot be *remedied* they can only be *punished*

3 Where the specific enforcement of the duty is inexpedient

There are duties, the specific performance of which the law can but will not enforce, because it is either indivisible or inexpedient to do so Thus the law will categorically refuse to enforce specifically most contracts, particularly contracts of service and promises of marriage and for obvious reasons In such cases, it will only provide pecuniary compensation

CHAPTER II

WRONGS OF ABSOLUTE LIABILITY

Definition

The requirement of *mens rea* is general throughout the civil and criminal law, but there are numerous exceptions to the rule The acts for which a man is responsible *irrespective of the existence of either wrongful intent or negligence* are described by the name of *Wrongs of Absolute Liability* They are the exceptions to the rule, *Actus non facit reum nisi mens sit rea* A man will be punished for committing these wrongs *even if he had not a guilty mind* The law will not inquire whether he did them *intentionally, negligently or innocently* it will presume the presence of the formal condition of liability

What do you understand by wrongs of absolute liability? To what maxim of law are they the exceptions? Illustrate your answer by reference to decided cases

B U Mar 1920
Oct 1935
1938

Describe the exceptions to the rule of Mens Rea in penal liability and discuss how far they can be justified

B U Oct 1932

The considerations on which they are based are numerous, but the most important of these is the evidential difficulty involved in procuring adequate proof of intention or negligence

INSTANCES—

The chief instances of wrongs of absolute liability fall into three divisions—1 *Mistake of law* 2 *Mistake of fact* 3 *Accident*

1 Mistake of law

Ignorantia juris neminem excusat is a maxim recognised by almost every legal system Ignorance of law is no excuse When a person has committed a wrong, the law will not hear him say that he had not a guilty mind and that but for his ignorance of law he would not have done it

Write a short note on the following — Ignorance of law is no excuse

B L Apr 1928
1934

The reasons for the above rule are—

1 The law is in legal theory definite and knowable, and it is the duty of every man to know that part of it which concerns him

The law is in most instances in harmony with the rules of natural justice A person committing a wrong may not be aware that he is breaking the law, but he knows very well that he is violating a rule of right.

2 Mistake of fact

In the English system, mistake of fact is an excuse only in *criminal* law while in civil law liability is commonly *absolute* in this respect

Write a short note on —Mistake of Fact
B U Apr 1938

So far as civil liability is concerned, it is a general principle of English law that he who intentionally interferes with the person, property reputation, or other rightful interests of another does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstance which justified his act

If, intending to arrest A I arrest B by mistake instead, I am absolutely liable to him notwithstanding the greatest care taken by me to ascertain his identity If I trespass on another man s land it is no defence to me that I believed it in good faith and on reasonable grounds to be my own

In the criminal law the contrast between mistake of law and fact finds its true application Absolute criminal liability for a mistake of fact is quite exceptional

A woman, honestly believing her husband to be dead marries again during his lifetime what crime, if any is the guilty of?
B. U Apr 1929

If a woman marries during the lifetime of her former husband but believing him to be dead she does not wilfully commit the crime of bigamy for one of the material circumstances lies outside her intention On the other hand where a man abducts a girl under the legal age of consent he is liable for it inevitable mistake as to her age is no defence he must take the risk

3 Inevitable accident

Inevitable accident is commonly recognised as a ground of exemption from liability both in the *civil* and in the *criminal* law

Write a short critical and explanatory note on —Accident
B U Oct. 1937

Accident is either culpable or inevitable It is culpable when due to *negligence* but inevitable when the avoidance of it would have required a degree of care *exceeding the standard demanded by the law*

Culpable accident is no defence save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability Inevitable accident is commonly a good defence both in the civil and in the criminal law

To the above rule however, there are, at least in the *civil* law, *important exceptions*

There are cases in which the law insists that a man shall act *at his peril*, and shall take his chance of accidents happening If he desires to keep wild beasts, or to light fires, or to construct a reservoir of water, or to accumulate upon his land any substance which will do damage to his neighbours if it escapes, or to erect dangerous structures by which passengers in the highway may come to harm, he will do all these things *suo periculo* (though none of them are *per se wrongful*), and will answer for all ensuing damage notwithstanding consummate care

What are the main exceptions to the rule that inevitable accident is a ground of exemption from liability? Illustrate your answer with examples, preferably from decided cases

B U Apr 1927
Oct 1931

A erects dangerous structures which may harm passengers in the highway A uses consummate care In spite of it B is injured Is A liable in damages to B? Give reasons

B U Oct 1929

Accident and mistake distinguished

It is necessary to distinguish accurately between accident and mistake, for they are near of kin An act which is not done intentionally is done either accidentally or by mistake It is done accidentally, when it is unintentional in respect of its *consequences* It is done by mistake, when it is *intentional* in respect of its *consequences* but *unintentional* in respect of some *material circumstance*

Distinguish between –Accident and Mistake

B U Oct 1930
1931
Apr 1937
1938

If I drive over a man in the dark because I do not know that he is in the road I injure him accidentally but if I procure his arrest, because I mistake him for some one who is liable to arrest, I injure him not accidentally but by mistake

Vicarious liability

Normally the person who is liable for a wrong is *he who does it* When one man is made answerable for the *acts of another*, it is an instance of *vicarious liability*

How far is vicarious liability recognised by law? Give some instances Is criminal responsibility ever vicarious?

B U Mar 1920

The principle of vicarious liability is almost foreign to the present notions of justice At the present day *criminal responsibility is never vicarious*, except in very special circumstances Modern *civil* law, however, recognises such liability in two chief classes of cases —

State and illustrate the meaning of 'Vicarious Liability'

B U Oct 1923

1 *Masters* are responsible for the acts of their *servants* done in the course of their employment

2 *Living representatives* are liable for the acts of *dead* men whom they represent

What is 'Vicarious Responsibility'? In what forms it is chiefly recognised by modern English Jurisprudence? Has the doctrine of the master's responsibility for the acts of his servant any rational basis and if so what?

B U Apr 1929

1—Master's liability for the acts of his servant.

The rule has its origin in the legal presumption that all acts done by a servant *in and about his master's business* are done by

Discuss the principle of vicarious responsibility with reference to its recognition in modern civil law

B U Apr 1931

the master's express or implied *authority*, and are therefore, in truth the acts of the master for which he may be justly held responsible

Write a short explanatory note on — Vicarious Responsibility

What is meant by Vicarious Responsibility? How far is this doctrine recognised in modern law? What is the rational basis for recognition of this doctrine?

B U Oct 1937

The rational basis of this form of vicarious liability, according to Salmond is twofold —

(i) In the first place, it would be very *difficult to prove actual authority* and very easy to disprove it in all cases There are such immense difficulties in the way of proving *actual authority* that it is necessary to establish a *conclusive presumption of it*

(ii) In the second place, *employers* usually *are* while their servants usually are not *financially capable of the burden of civil liability*

2 —Responsibility of living representatives for the acts of dead

Discuss the following —A defames B Before B can sue A A dies Has B any remedy?

B U Oct 1928

The common law maxim was *Actio personalis moritur persona* A man cannot be punished in his grave It was held therefore that *all actions for penal redress*, must be brought against the living offender and *must die with him* This old rule has been in great part abrogated by statutory provisions

Criminal responsibilities *die with the wrongdoer* himself As regards *civil* responsibilities it is recognised that the right of succeession is merely the right to acquire the dead man's estate subject to all charges which may justly be imposed upon it

Measure of criminal liability

Explain with examples the measures of criminal and civil liability

B L Mar 192-

In deciding the measure of liability for *criminal* offences the law directs its attention mainly to the deterrent efficacy of punishment From this point of view there are three elements in every crime to be taken into account. These are (i) the *motives* to the commission of the offence (ii) the *magnitude* of the offence and (iii) the *character* of the offender

1 The motive of the offence

Other things being equal the greater the temptation to commit a crime the greater should be the punishment

This principle is subject to this reservation that in many cases extreme temptation is a ground of extenuation rather than of increased severity of punishment, *e g*, where a person is driven to the wrongful act not by the strength of bad disposition but by that of his social or sympathetic impulses, or when he injures another in retaliation for some intolerable insult

2. The magnitude of the offence

Other things being equal, the greater the offence, *that is to say*, the greater the sum of its evil consequences or tendencies, the greater should be its punishment

3 The character of the offender

The last factor that is taken into consideration is the character of the offender The *worse* the character or disposition of the offender, the *more severe* the punishment he deserves

If a man s emotional constitution is such that normal temptation acts upon him with abnormal force, it is for the law to supply in double measure the counteractive of penal discipline

The measure of civil liability

"Penal redress is that form of penal liability in which the law uses the compulsory compensation of the person injured as an instrument for the punishment of the offender This form of punishment takes no account of the character of the offender, the motives of the offence, or probable or intended consequences It is measured exclusively by the magnitude of the offence, *that is to say*, by the *amount of loss inflicted by it* "

What are the elements which should be taken into account in determining the appropriate measure of punishment for a crime? State in the case of each element why it is necessary to take the same into account?

B U Oct 1927

Discuss the elements that are to be taken into account in determining the appropriate measure of punishment

B U Oct, 1929

Discuss the various elements which it is necessary to consider in giving appropriate punishment to an offender

B U Apr 19 0

Discuss how far motive is important in civil and criminal liability

B U Mar 1923

Discuss the relevancy of motive in civil and criminal liability

B U Oct 1924

How far is the magnitude of the offence a measure in assessing the liability for a wrong?

B U Oct 1921

CHAPTER III

INTENTION

Definition

State and illustrate the significance of the words Intention Malice" and Negligence as used in law

B U Apr 1927
1933

Intention is defined by Salmond as *the conscious purpose or design with which an act is done.* It is the foreknowledge of the act coupled with the desire of it

"*An act is intentional if, and in so far as it exists in idea* before it exists in fact the idea realising itself in fact because of the desire by which it is accompanied"

An act is wholly unintentional if no part of it is the outcome of any *conscious purpose* or *design* no part of it having existed in idea before it became realised in fact I may omit to pay a debt, because I have completely forgotten that it exists

An act may be in part intentional and in part unintentional

A woman honestly believing her husband to be dead marries again during his lifetime What crime if any is she guilty of?

B L Apr 1929

It is to be noted that a wrong is intentional only when the intention extends to *all* its elements namely, its *origin* its *circumstances,* and its *consequences* To trespass on A's land believing it to be one's own is not wilful wrong as the act is unintentional as to the circumstance that the land belongs to A So if a woman marries again during the lifetime of her former husband but believing him to be dead, she does not wilfully commit the crime of bigamy, for one of the material circumstances lies outside her intention

True intention is the foresight of a desired issue however improbable not the foresight of an undesired issue however probable' Discuss this statement

B U Apr 1926

Intention does not necessarily involve expectation The consequences desired may not be *expected* I may intend a result which I know to be highly improbable So an act may be intentional with respect to a particular circumstance, although the chance of the existence of that circumstance is known to be exceedingly small *True intention is the foresight of a desired issue however improbable not the foresight of an undesired issue however probable* If I fire a rifle in the direction of a man a mile away I may know perfectly well that the chance of hitting him is not one in a thousand I may fully expect to miss him nevertheless I intend to hit him if I desire to do so

Conversely *expectation does not in itself amount to intention* The result expected need not be the consequence intended A surgeon may know very well that his patient will probably die of the operation yet he intends the recovery which he does not expect and not the fatal consequence which he expects

Knowledge and intention

It must be noted that knowledge and intention commonly go together, for he who *intends* a result usually *knows* that it will follow, and he who knows the consequences of his act usually intends them But there may be intention without knowledge, the consequence being desired, but not foreknown as certain or even probable Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended When King David ordered Uriah the Hittite to be set in the forefront of the hottest battle, he intended the death of Uriah only, yet he knew for a certainty that many others of his men would fall at the same time and place

Write a short critical and explanatory note on —

'There may be an intention without knowledge, and conversely there may be knowledge without intention

B U Oct 931

The law, sometimes, imputes intention to a wrongdoer which in fact he did not possess Consequences which in fact are the outcome of negligence merely are dealt with as intentional The reason for the recognition by the law of such cases of constructive intention is the expediency of extending to the more serious forms of negligent wrongdoing the liability attached to the wilful wrongdoing

It is sometimes said that *a person is presumed in law to intend the natural or necessary results of his actions* This Salmond observes, is too wide a statement, for, if true, it would eliminate from the law the distinction between intentional and negligent wrongdoing merging all negligence in constructive wrongful intent

Intention and motive

Intention must be carefully distinguished from motive Very few acts are done for their own sake Almost every act has both an *intention and a motive behind it* A person who does an act, especially a wrongful act, has, almost invariably some ulterior object which he desires to fulfil by means of it

Define Motive and distinguish it from Intention' giving illustrations in support of your answer

B U Apr 1932

Distinguish between intention and motive

B U Apr 1923

Discuss fully the difference between Motive Intention and Malice

B U Oct 1929

If a thief robs a person, his immediate intention is, of course to deprive that person of his belongings but the thief would have no interest in robbing the person merely for the sake of depriving that person of what belongs to him His ulterior object is to enrich himself by so much This object is his motive

The intent of a wrongdoer is divisible into two portions which may be distinguished as *immediate* and *ulterior* The former relates to the *wrongful act itself* It is the purpose *to commit* the wrong The ulterior intent, called *motive* is the purpose *in committing* the wrong

Malice

Define Malice
B U Apr 1943

In common language it means ill will, spite, or malevolence In *law*, it includes "any intent which the law deems wrongful and which therefore serves as a ground of liability"

Motive

In law a man's motives are irrelevant' Comment upon this statement and indicate its principal qualifications
B U Oct 1929
Apr 1932
Oct 1934

As a general rule a man's motive is irrelevant in determining the question of legal liability Generally, no act otherwise lawful becomes unlawful because done with a bad motive, conversely, no act otherwise unlawful is excused or justified, because of the motives of the doer, however good The law will judge a man by what he *does*, not by the *reasons* for which he does it *To this rule as to the irrelevance of motives there are a few exceptions the chief of which are the following* —

1 Criminal Attempts

To what extent does the law take into account the motives of a wrong-doer?
B U Apr 1926
Oct 1930

What are the exceptions to the general rule of law that no act otherwise lawful becomes unlawful because done with a bad motive? Illustrate your answer with examples
B U Oct 1927
Apr 1928

Comment upon the following The law will judge a man by what he does not by the reasons for which he does' Enumerate and explain the exceptions to the above rule
B U Oct. 1933

An attempt to commit an offence is *itself* a crime Every attempt is an act done with intent (motive) to commit the offence so attempted *The existence of this ulterior intent or motive is of the essence of the attempt* The act itself may be perfectly innocent, but is deemed criminal by reason of the *purpose* with which it is done To mix arsenic in food is itself a lawful act, for it may be designed to kill rats but if the purpose is to kill a human being the act will become a criminal attempt

Every intentional crime involves four distinct stages— *intention*, *preparation*, *attempt* and *completion* Of these the two former are commonly innocent but the two last stages in the offence are grounds of legal liability

The question as to what amounts to criminal attempt resolves itself into this What is the distinction between *preparing* to commit a crime and *attempting* to commit it? This is a question to which English law gives no definte or sufficient answer

Sir James Stephen defines an attempt to commit a crime as "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission, if it were not interrupted." This Salmond observes affords no adequate guidance, and lays down no principle which would prevent conviction for attempted forgery on proof of the purchase of ink and pot

What is the distinction between preparing to commit a crime and attempting to commit it? Can you suggest any practical test? Give illustrations

B U Apr 1929

According to Salmond, the possibility of a successful issue is not a necessary element in an attempt A person attempts to steal by putting his hand into an empty pocket or to poison by administering sugar which he believes to be arsenic It was long supposed to be the law of England that there could be no conviction for an attempt in such cases It was considered that an attempt must be part of a series of acts and events which, in its completeness, would actually constitute the offence attempted Recent decisions have determined the law otherwise The possibility of a successful issue is not a necessary element in an attempt and this conclusion seems sound in principle The matter, however, is not free from difficulty, since it may be argued on the other side that acts which in their nature cannot result in any harm are not mischievous either in their tendency or in their results, and therefore should not be treated as crimes

A stealthily puts his hand in B's pocket with intent to remove money from there The pocket is empty and A's intent cannot be carried out Can A be said to have committed an offence? And if so, what?

B U Apr 1929

2 Cases in which a particular intent forms part of the definition of a criminal offence

Burglary for example, consists in breaking and entering a dwelling house by night with intent to commit a felony therein

3 Exceptional cases of civil wrong in which motive is material to liability

In *civil* liability the *ulterior intent* is very *seldom* relevant In almost all cases the law looks to the *act done* and makes no inquiries into the *motives* from which it proceeds There are however, certain exceptions to this rule and the chief of them fall within a principle that harmful act may be *damnum sine injuria* if done from a proper motive and without malice, but lacks this protection so soon as it proceeds from some motive of which the law does not approve Examples of such wrongs are *defamation* and *malicious prosecution* In both of these the plaintiff must prove malice

Jus necessitatis

Have you in your study of the theory of wilful wrong doing come across any special case, in which although intention is present the mens rea is nevertheless absent? What is the special case? Briefly discuss the doctrine underlying it

B U Oct 1936

In the study of the theory of wilful wrongdoing we come across a special case in which, although *intention* is *present*, the *mens rea* is nevertheless *absent* This is the case of *jus necessitatis* So far as the abstract theory of responsibility is concerned *an act which is necessary is not wrongful, even though done with full and deliberate intention* It is a familiar proverb that necessity knows no law *Necessitas non habet legem* By necessity is here meant the presence of some motive adverse to the law, and of such exceeding strength as to overcome any fear that can be inspired by the threat of legal penalties The *jus necessitatis* is the *right of a man to do that from which he cannot be dissuaded by any terror of legal punishment*

Explain Jus necessitati

B U Apr 1933
Oct 1938

The common illustration of this right of necessity is the case of two drowning men clinging to a plank that will not support more than one of them It may be the *moral* duty of him who has no one dependent on him to sacrifice himself for the other who is a husband or a father it may be the moral duty of the old to give way to the young But it is idle for the law to lay down any other rule save this, that it is the right of the stronger to use his strength for his own preservation Another familiar case of necessity is that in which shipwrecked sailors are driven to choose between death by starvation on the one side and murder and cannibalism on the other A third case is that of *crime committed* under the pressure of illegal threats of death or grievous bodily harm "If," says Hobbes, "a man by the terror of present death be compelled to do anact against the law he is totally excused because no law can oblige a man to abandon his own preservation" (*See secton 95 Indian Penal Code*)

Write a short note on —Necessity has no law

B U Oct 1950

In such cases an essential element of the *mens rea* namely freedom of choice between good and evil is absent, and so far as abstract theory is concerned there is no sufficient basis of legal liability

CHAPTER IV

NEGLIGENCE

Definition

"This term has *two* uses, for, it signifies sometimes a particular *state of mind*, and at other times *conduct* resulting therefrom The former is the *subjective*, and the latter the *objective* sense In the *former* sense, negligence is opposed to *wrongful intention*, in the *latter*, it is opposed not to wrongful intention but to *intentional wrongdoing* "

What is negligence in law?
B U Oct. 1920
Apr 1934

Negligence' is nothing short of extreme carelessness *What is then careless ness?* In the first place carelessness'excludes'wrongful intention 'nothing which was intended can have been due to *carelessness* It should be observed in the second place that carelessness or negligence does not necessarily consist in *thoughtlessness'* or '*inadvertence*', this is doubtless the *commonest* form of it, but it is not the *only* form There is a form of negligence in which there is no thoughtlessness or inadvertence whatever

State and illustrate the significance of the word negligence' as used in law
B U Apr 1927

If then negligence or carelessness is not to be identified with thoughtlessness or inadvertence what is its essential nature? The correct answer is that *the essence of negligence is not inadvertence but indifference* ' *A careless person is a person who does not care* "

Negligence, therefore, essentially consists in *the mental attitude of undue indifference with respect to one's conduct and its consequences*

Define and explain Negligence' pointing out its essential elements according to Salmond
B U Mar 1924
Oct 1932

Its kinds

Negligence is either 1 Advertent or inadvertent and 2 Gross or wilful

1 Advertent and inadvertent

Negligence is of two kinds, according as it is or is not accompanied by inadvertence *Advertent negligence is commonly termed wilful' negligence or 'recklessness ' Inadvertent negligence may be distinguished as 'simple '* In the former, the harm done is *foreseen as probable*, but it is not *willed* In the latter, it is *neither foreseen nor willed* In each case carelessness, that is, *indifference as to consequences*, is present but in the former case, this indifference does not while in the latter it does, *prevent* these consequences from being foreseen

A drunken man stumbles as he walks along a public street though he tries his best to walk straight He knocks up against and breaks a shop-window Is he liable to the shop-keeper? What is the basis of such liability if any?
B U Apr 1929 1940

Against the above analysis of negligence it may be said, It is not true that in *all* cases negligence amounts to carelessness in the sense of *indifference* A drunken man is liable for negligence if he stumbles as he walks along the street and breaks a shop window yet he may have been exceedingly anxious to walk in a straight line and to avoid any such accident He may have been conscientiously using his best endeavours, but they will not serve to justify him on a charge of negligence In such a careless ness in the sense of indifference is really present, though it is *remote* instead of *immediate* The drunken man may be anxious and careful *now* not to break other persons' windows, but if he had been sufficiently anxious and careful on the point *some time ago* he would have remained *sober*, and the accident would *not* have happened The drunken man is therfore liable for damages as he is *guilty of negligence*

Gross and wilful

Define— Gross negligence 'Wilful negligence'
B U Mar 1934

Some jurists attempt to make a distinction as *gross negligence* and *slight negligence*, implying by the former a *higher* degree of negligence than that of the latter No such distinction exist in English law

Negligence is commonly termed *wilful* negligence if it is *advertent* It is also called *recklessness* In this kind of negligence as distinguished from what is called *inadvertent* or *simple* negligence, the harm done is *foreseen as possible or probable* but it is not *willed* In inadvertent negligence the harm is neither *foreseen* nor *willed*

Thus if a physician treats a patient improperly through *ignorance* or *forgetfulness* he is guilty of *simple* or *inadvertent* negligence but if he does the same in order to save himself trouble or by way of a scientific experiment with full recognition of the dangers so incurred his negligence is *wilful*

Intention and negligence

Distinguish between 'Intention and Negligence'
B U Oct 1931

The wilful wrongdoer desires to *do* the harm the negligent wrongdoer does not sufficiently desire to *avoid* it, being careless (if not wholly yet unduly) whether they ensue or not

An unskilled physician contracts (see opposite) Has A a remedy against P?
B U Apr 1928

An unskilled physician P devotes his utmost attention and strenuous endeavour to the cure of his patient A but his treatment is wrong and A is injured thereby in health Has A a remeby against P?

In this case the unskilful physician is legally responsible not because he is *ignorant or unskilful* for skill and knowledge may be beyond his reach but because *being unskilful and ignorant he ventures to undertake a business which calls for qualities which he does not possess* It is a settled principle of law that want of skill or of professional competence amounts to negligence P is therefore guilty of negligence and must pay damages to A

Standard of care

In as much as carelessness varies in degree, it is necessary to know *what degree of it is required to constitute culpable negligence?* What *measure of care* does the law demand?

What is the standard of care which the law ordinarily requires?
B U Oct 1920 Mar 1924

The law does *not* demand the *highest* degree of care of which human nature is capable The law demands not that which is *possible* but that which is *reasonable* in view of the magnitude of the risk Were men to act on any *other* principle than this, excess of caution would paralyse the business of the world *The law demands the amount of care which would be shown in the circumstances of the particular case by an ordinarily careful man* Less than this is not sufficient and more than this is not required

Are there different degrees of negligence recognised by English law?
B U Mar 1924

The English law recognises only *one standard of care* and therefore *only one degree of negligence*

The English law does not recognise *different* degrees of negligence as is done under the Roman Law e g negligence is divided into three degrees, (i) *culpa minima* or trifling negligence, (ii) *culpa levis* or ordinary negligence, and (iii) *culpa lata* or gross negligence

Theories of 'negligence'

There are two theories advocated by jurists 1 The theory of Inadvertence and 2 The Objective theory of negligence

1 Theory of Inadvertence

It is held by some that negligence consists essentially in inadvertence—in a *failure to be alert* circumspect, or vigilant The *wilful* wrongdoer is he who *knows* that his act is wrong the *negligent* wrongdoer is he who does *not* know it, but *would* have known it, were it not his mental *indolence*

This explanation says Salmond contains an important element of the truth but it is *inadequate* For in the *first* place, all negligence is not inadvertent there is such a thing as *wilful* or *advertent* negligence in which the wrongdoer *foresees* the probable consequences of his act and yet does not *intend* them In the *second* place, all inadvertertence is not 'negligence' He who

is ignorant or forgetful, notwithstanding a genuine desire to attain knowledge or remembrance is *not* negligent The essence of negligence therefore, is not *inadvertence*—which may or may not be due to carelessness—but *carelessness*—which may or may not result in inadvertence

2 The Objective theory

Summarise and explain briefly but clearly the various theories about the legal concept of negligence pointing out the material points of difference between Salemond's theory and the other theories

B U Oct 1932
Apr 1935

It is held by some that negligence is not a *subjective*, but an *objective* fact It is not a particular state of *mind* or *form* of *mens rea* at all, but a particular kind of *conduct* It is a breach of the duty of taking care

Salmond says that this theory is not based on correct view of the law Neglect of needful precautions or the doing of unreasonably dangerous acts is not necessarily wrongful at all, for it may be due to inevitable *mistake* or *accident* And on the other hand, even when it is wrongful, it may be *wilful* instead of *negligent*

CHAPTER V

THE LAW OF OBLIGATIONS

Definition

Define 'Obligation'
B U Apr 1934
Oct 1942

An obligation in its *legal* sense may be defined as *a proprietary, right in personam or a duty which corresponds to such a right*

Chose in action

Write short note on—'Chose in action'
B U Oct 1930
1932
1935
Apr 1937

A technical synonym for 'obligation' is *chose in action'* or 'thing in action' A chose in action means a proprietary right *in parsonam,* for example, a debt or a claim for damages for a tort

Chose in possession

Explain and illustrate the nature and meaning of 'choses in action' and distinguish the same from choses in possession'
B U Oct 1932
Apr 1937

As stated above, a chose in action means a proprietary right *in parsonam*, for example, a debt, a share in a joint stock company A non proprietary right *in parsonam* such as that which arises from a contract *to marry* is *not* a chose in action Choses in *'action'* are oposed to choses in *'possessoin'* In its *origin* a 'chose in *possession*' was any thing or right which was accompanied by *possession,* while a chose in *action'* was any thing or right of which the claimant had *no possession*, but which he must obtain, if need be, by way of an action at law Money in a man's purse was a thing in possession money *due* to him by a *debtor* was a thing in action

Are chose in action identical with the rights over immaterial property? If not, point out the distinction fully
B U Oct 193-

Kinds of obligations

State and explain briefly the classes into which the obligations recognised by English law are divisible in respect of their modes of origin
B U Oct 1942

Classed in respect of their *sources* or modes of origin, the *obligations* recognised by English Law are *divisible into five classes* They are the following —

1 Contractual

We have seen above that contract is a kind of agreement which creates rights *in personam* between the *parties* to it Now,

of rights *in personam*, obligations are the most numerous and important kind and of those which are not obligations, comparatively few have their source in the agreement of parties.

State and illustrate the various classes of obligations according to English law

B U Mar 1923
1924
Oct 1924
Apr 1925

2 Delictal

By this is meant the duty of making *pecuniary satisfaction* for wrong known as '*tort*'

A tortious obligation is a *liability to pay pecuniary damages* for a civil wrong which in English law, is confined to those specific wrongs for which remedy is an *action for damages* and does not include a mere breach of a contract or of a trust or other merely equitable obligation Thus Z is driving furiously in a crowded street and injures B Z is under the obligation to pay damages to B

Explain briefly the classes into which obligations are divided in respect of their sources

B U Mar 1924
Apr 1934

3 Quasi contractual

There are certain obligations which are *not* in truth contractual but which the *law* treats *as if they were*

What is a quasi contract? Give instances of such contracts

B U Oct 1924

A contract implied in *law* should be distinguished from a contract implied in *fact* The latter is a true contract though its existence is *inferred* from the *conduct* of parties Thus if I enter into an omnibus I *impliedly* agree to pay the usual fare A contract implied in *law* is on the contrary merely *fictitious*, for the parties to it have not *agreed* at all either expressly or tacitly Thus a Judgment creates a debt which is not contractual but quasi—contractual so also does the receipt of money paid by mistake or obtained by fraud

The reasons for the recognition of quasi contracts are the three following —

1 The traditional classification of the various forms of personal actions as being based either on contract or on tort

2 The desire to supplply a theoretical basis for new forms of obligation established by judicial decision

Give reason for the recognition of quasi contracts

B U Oct 1930

3 The desire of plaintiffs to obtain the benefit of the superior efficiency of contractual remedies

4 Innominate

This class of obligations comprehends all those which are *not* included in the *first three classes* and are so called because they have no comprehensive and distinctive title Within this class are included the obligations of trustees towards their beneficiaries

5 Solidary

Define a 'solidary obligation.'
B U Oct 1928
1929
Apr 1933
Oct 1934
Apr 1943

The normal type of obligation is that in which there is *one* creditor and one debtor It often happens, however, that there are two or more *creditors* entitled to the *same* obligation, or two or more *debtors* under the *same liability*

A solidary obligation may be defined as one in which *two* or *more* debtors owe the *same* thing to the *same* creditor

Examples of it are debts owing by a firm of partners, debts owing by a principal debtor and guaranteed by one or more sureties, and the liability of two or more persons who jointly commit a tort In all such cases each of the debtors is bound *in solidum* instead of *pro parte*, that is to say, for the *whole* and not for a proportionate *part*

Solidary Obligations are of three kinds

Several	Joint	Joint and Several
(a) There are as many *distinct* obligations and causes of action as there are debtors They have *different* sources (b) The *vinculum juris* is *distinct* and *independent* (c) The subject matter is the same Performance by *one* necessarily discharges *all* the others also	(a) Only *one* debt though two or more *debtors* Only one *thing* owed Only one *cause of action* Only one *source* (b) The *vinculum juris* is *single* and binds several debtors to the same creditor (c) Owing to unity of obligation *all* debtors are discharged by anything which discharges any *one* of them	It is the product of a *Compromise* of two competing principles The law treats this class of obligations as joint for some purposes and as several for other purposes They have the same source and the same subject matter But the law does not consistently regard their *vinculum juris* as single

Explain and illustrate the various kinds of solidary obligations
B U Oct 1928
1929
Apr 1937

PART II

LAW OF [illegible]

CHAPTER I

PERSONS

Definition

"A 'person' may be defined as *any being to whom the law attributes a capability of interests and therefore of rights, of acts and therefore of duties.*'

In law there may be *men* who are not *'persons'* slaves for example are destitute of legal personality in a system which regards them as incapable of rights or liabilities Like cattle they are *things* and the *objects* of rights not *persons* and the *subjects* of them Conversely there are in law *persons who are not men* A jointstock for example is a person

"So far as legal theory is concerned a person is any being whom the law regards as capable of rights or duties Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man Persons are the substances of which rights and duties are the attributes It is only in this respect that persons possess *juridical* significance, and this is the exclusive point of view from which personality receives legal recognition" Salmond

So far as egal theory is concerned a person is any being whom the law rega rds as capable of rights or duties' Comment upon this
B U Oct 1938

KINDS OF PERSONS

Persons are of two kinds —*Natural, and Legal*

1 Natural

A natural person is a being, to whom the law attributes personality in accordance with reality and truth Natural persons are human beings, and consequently persons in fact as well as in law

Define and distin guish between a natural and a legal person
B U Oct 1920
Apr 1928
1932
1938
Oct. 1939

2 Legal

Legal persons are beings, real or imaginary, to whom the law attributes personality *by way of fiction* when there is none *in fact* They are persons *in law*, but *not in* fact They are also described as *fictitious, juristic, artificial or moral persons*

Define a 'legal per son
B U Oct 1921
1928
1936

Is the term 'legal' person applicable to the following ?—(a) A firm of merchants (b) A club, (c) A bank (d) A university ?

B U Oct 1928

(a) Thus a firm of merchants is not a person in the eye of the law, it is nothing else than the sum of its individual members Similarly a club is not a legal person *A bank* the bank established under a statute shall be a body corporate with perpetual succession and a common seal and may hold land, and may sue and be sued in its corporate name *A university* A university is recognised as a legal person

Kinds of legal persons

State and explain the different kinds of legal persons taking into account different legal systems

B U Apr 1933 1938

Legal persons fall within a *single class* viz *corporations* or bodies corporate *A corporation is a group or series of persons which, by a legal fiction, is regarded and treated as a person*

Legal personality is distinguished into *three* varieties by reference to the different kinds of things which the law selects for personification —

1 *Corporation* —The first class consists of corporations (See below)

What different kinds of legal persons are recognised in law ?

B U Oct 1928 Apr 1936

2 *Institution* —The second class is that in which the object selected for personification is not a *group* or *series* of *persons* but an *institution,* a church for example or a university

3 *Fund or Estate* —The third class in which the *corpus* is some fund or estate devoted to special uses—a charitable fund for example, or a trust estate

Corporation

A corporation is a group or series of persons which by a legal fiction is regarded and treated as itself a person"

Its kinds

Corporations are of two kinds, *Corporations aggregate* and *Corporations sole*

1 Corporation aggregate

It is a *group* of *Coexisting* persons

Distinguish between a Corporation sole and a Corporation aggregate

B U Apr 1929 1931 1937

Corporations aggregate have *several* members at a time Examples are a registered company, consisting of all the share holders and a municipal corporation, consisting of the inhabitants of a borough

Such a corporation, *e g*, a company, is in law something different from its members The property of the company is not the property of the shareholders The debts and liabilities of the company are not attributed in law to its members A shareholder may enter in a contract with the company, for the two parsons are entirely distinct from each other

Is the term 'legal, person' applicable to the following ?—A firm of merchants
B U Oct 1928

In all these respects a company is essentially different from an unincorporated partnership A firm is not a person in the eye of law It is nothing else than the sum of individual members A change in the list of partners is the substitution of a new firm for the old one, and there is no permanent legal unity, as in the case of a company There can be no firm which consists of one partner only, as a company may consist of one member

Explain what is meant by—'A firm is not person in the eye of law"
B U Apr 1936

2. Corporation sole

A corporation sole consists of an incorporated *series* of *successive* persons *Corporations sole* have only *one* member at a time Examples are the Sovereign (at common law), the Post master General, the Solicitor to the Treasury and the Secretary of State for War, the Advocate General of Bombay etc

Explain the nature and purposes of the two kinds of corporation recognised by the English systems of law
B U Oct 1921

In the case of a corporation sole The element of legal fiction involved is that law assumes that in addition to the *natural* person, administering *for the time being* the duties and affairs of the office, there is a *mythical* being who is, in law, the *real occupant* of the office and who *never dies* or *retires* The living official is merely an *agent* or *representative* through whom this legal person performs his functions The human official comes and goes but this offspring of the law remains the same for ever

State the general uses and purposes of Incorporation'
B U Oct 1921
Apr 1927
1929
Oct 1938

2 Its uses

What are the chief devices adopted by law to overcome the great difficulty it finds in dealing with common interests vested in large numbers of individulas and with common action in the managment and protection of such interests ?
B U Oct 1934
1937

(I) In life individual ownership is more common than any other form of ownership Where however there is *common* ownership between individuals, difficulties are likely to arise *Collective* ownership is reduced to *simple* ownership by the devices of *trusteeships* and *incorporation* In incorporation there is *one* person in the eye of the law, *Common* ownership is, by this device, reduced to *individual* ownership

Explain how the legal device of 'Incorporation' has made use of in modern times to enable traders to trade with limited liability

B U Apr 1929
Oct 1937

Moreover, incorporation is often used to enable traders to trade with *limited liability* As the law stands, he who ventures to trade *by himself* is answerable for all losses This risk is avoided by means of incorporation, which, in case of loss, only affects the *capital* supplied to the company This scheme does not cause injustice to the creditors of the company because those who deal with the company know the *nature* or their security

As stated above incorporation enables traders to trade with limited liability As the law stands he who ventures to trade *in propria persona* must put his whole fortune in the business The risk is a serious one even for him whose business is all his own, but it is far more serious for those who enter into partnership with others In such a case a man may be called upon to answer with his whole fortune for the acts or defaults of those with whom he is disastrously associated

This risk is avoided by means of incorporation If the business is successful the gains made by the company will be held on behalf of the shareholders, if unsuccessful, the losses must be borne by the company itself *For the debts of a corporation are not the debts of its members* The only risk run by its members is that of the loss of the capital with which they have supplied or undertaken to supply the company for the purpose of enabling it to carry on its business To the capital so paid or promised, the creditors of the insolvent corporation have the first claim but the liability of the shareholders extends no further

A village society incorporated under the Cooperative Societies Act borrowed Rs 5 000 from the Central Bank and advanced some loans to two of its members X and Y The Central Bank obtained a decree for the amount due against the said society and sought to recover it from X and Y attaching their property The Court held that decree being against the society was not executable against its members individually State your view as to the correctness or otherwise of this decision giving reasons

B U Apr 1941

Its acts and liabilities

What is the authority of the agents of a corporation?

B U Apr 1931

A *legal* person is as *incapable of conferring authority upon an agent to act on its behalf* The authority of the agents and representatives of a corporation is therefore conferred, limited, and determined not by the *consent* of the *principal*, but *by the law itself* It is the *law* that determines who shall act for a corporation and within what limits his activity must be confined

How far is a corporation liable for the wrongful act of its agents?

B U Apr 1931

A corporation may be held liable for wrongful acts this liability extends *even* to those cases in which malice, fraud or other wrongful motive or intent is a necessary element The corporation is responsible not only for what its agents do but also for the *manner* in which they do it *If* its agents do negligently or fraudulently that which they might have done lawfully and with authority, the law will hold the corporation liable The liability of the corporation may be criminal and not civil only though this is very rare

Discuss and explain fully the circumstances under which and the theoretical bases on which a corporation is held liable for the tortious or criminal acts of its servants or representatives

B U Apr 1942

Its creation and extinction

'The birth and death of *legal* persons are determined *not* by *nature* but by *law* They come into existence at the will of

the *law*, and they endure during its pleasure They are, in their own nature, capable of indefinite duration, but they are *not* capable of destruction The extinction of a body corporate is called its *dissolution* ''

Its theories

There are *two* theories 1 The *fictitious theory* and 2 The *realistic theory*, regarding the legal personality of a corporation

1 Fictitious

According to this theory a corporation is a group or series of persons which, by a legal fiction *is regarded and treated as itself a person* The personality of a corporation is a fictitious being which is quite distinct from and stands over against its corpus, namely shareholders or members The fictitious being is a being without soul or body, not visible save to the eye of law, as in the case of a company

Summarise the various theories regarding legal personality of a corporation and write a short critical note on the same which of these theories is advocated by Salmond and on what grounds ?

B U Oct 1931

2 Realistic

According to the *realistic theory*, a corporation is nothing more, in law or in fact than the aggregate of its members conceived as a unity, and this unity, this organisation of human beings is a *real person* possessed of a real will of its own and capable of actions and of responsibility just a man is

Salmond is an advocate of the *fictitious* theory and criticises the realistic theory on the following ground He says that the realistic theory does not apply to *corporations* sole and *even* in the case of corporations *aggregate* the personality is simply *fictitious* Ten men do not become one person in reality because they associate together for one purpose any more than two horses become one animal when they draw the same cart Salmond says that no one denies the reality of the composite company (that is to say the group of shareholders) what is in truth denied is the reality of that unitary notional entity which may in law survive the last of them A group or society of men is a very *real thing* but it is only a *fictitious person*

How does Salmond reconcile the Realistic theory of corporation with the fictitious theory ?

B U Apr 1933

State as a Corporation

The state being the greatest of all forms of human society deserves to be recognised as a legal person or a corporation But the law of England

What position does the state hold in the scheme of legal persons ?

B U Apr 1937

refuses to personify and incorporate the Empire as a whole as also the various constituent self governing states of which the Empire is made up, for example the Government of India The real personality of he King has rendered superfluous any attribution of fictitious personality to the state itself

Can the Government of India be regarded as a corporation of either kind (i e Aggregate or sole')?

[No]

B U Oct 1931

King as a Corporation

Discuss —What is involved in the idea of the King as a corporation sole ?

B U Apr 1927

In modern times it has become usual to speak of the Crown rather than of the King, when we refer to the King in his public capacity as a body politic The usage is of great convenience It must however be understood that this reference to the Crown is only a figure of speech The Crown is not in itself a person in the law The only legal person is the body corporate constituted by the series of persons by whom the crown is worn

Doctrine of double personality

Write a short critical and explanatory note on The doctrine of double or plural personality

B U Oct 1932
Apr 1936
1937
Oct 1938

One man may possess several personalities at one time He is one *man*, but two or more *persons* Thus Z may be an insolvent, an accused person a creditor, as also a trustee He is one man but has *four* personalities and in *each* his rights and liabilities are distinct In *one* capacity or right, he may have legal relations with himself in his *other* capacity or right This is known as the *Doctrine of Double personality* '

Double personality exists chiefly in the case of *trusteeship*. A trustee is for many purposes two persons in the eyes of the law In right of his *beneficiary* he is *one* person and in his *own* right he is *another* In the one capacity he may owe money to himself in the other

Legal status of—

1 Animals

Discuss briefly the legal status of lower animals

B U Mar 1920
Apr 1925

In law, beasts are not *persons* but *things* They have no legal rights

"That which is done to the hurt of a beast" says Salmond ' may be a wrong to its *owner* or to the *society* of mankind, but it is no wrong to the *beast* If a testator vests property in trustees for the maintenance of his favourite *horses* or *dogs* he will thereby create *no* valid trust enforceable in any way *by* or *on behalf of*, these non human beneficiaries"

It may be noted that cruelty to animals is an offence. This is so not because the law recognises the rights of the animal but it is in the interest of humanity that cruelty should be penalised. It must be noted that a trust for the benefit of particular *classes* of animals, as opposed to *one* of *individual* animals, is *valid* and *enforceable* as a *public* and *charitable* trust, *e g* a provision for the establishment and maintenance of a *home for stray dogs and broken down horses*.

Thus A by his will leaves a certain sum of money in trust for the establishment of a home for broken down horses and another sum of money in trust for the maintenance of his faithful dog Fido. As stated above, no animal can be the owner of any property even through the medium of a human trustee. If a testator vests property in trustees for the maintenance of his favourite horses or dogs, he will thereby create no valid trust enforceable in any way by or on behalf of these nonhuman beneficiaries. The only effect of such provisions is to authorise the trustees, if they think fit to expend the property or any part of it in the way so indicated and the residue will go to the testator's representatives as undisposed of. A trust however, for the benefit of particular *classes* of animals, as opposed to one for *individual* animals is valid and enforceable as a *public* and *charitable trust*. The provision, therefore, for the establishment and maintenance of a *home for broken down horses* is a *valid* one and the other is not. These trusts are enforced not because the beasts have any legal right but because the community has a rightful interest in the well being even of the dumb animals which belong to it. The trust for the maintenance of his dog Fido is void and illegal.

A by his will leaves a certain sum of money in trust for the establishment of a home for broken down horses and another sum of money in trust for the maintenance of his faithful dog Fido. Are these trusts valid?

B U Apr 1928

2. Unborn persons

It is perfectly possible for an *unborn* person to own property. His ownership is necessarily *contingent* for he may never be born at all, but it is none the less a *real* and *present* ownership.

Discuss briefly the legal status of unborn persons

B U Mar 1920
Apr 1925
Oct 1929
Apr 1935
1937

In this connection it may be noted that a child in its mother's womb is, for many purposes, regarded by a legal fiction as already *born*. Thus it is perfectly legal for a person to "settle his property upon his wife for the children to be born of her".

Discuss the following. A settles his property upon his wife for the children to be born of her. Is the settlment valid?

B U Oct. 1928

3. Slaves

In Roman law slaves were *men* but not *persons*. They are destitute of legal personality. Like cattle, they are *things* and objects of rights not *persons* and *subjects* of them.

Discuss briefly the legal status of slaves

B U Mar 1922

4 Dead men

Discuss briefly the legal status of dead persons

B U Mar 1920
Apr 1925
Oct 1926
Apr 1930
1937

In law, the dead are '*things*' and not '*persons*' They have no rights, no interests A dead man's corpse is not '*property*' in the eye of the law It cannot be disposed of by will or by any other instrument

Thus a permanent trust for the maintenance of a man's *tomb* is illegal and void

A testator direct in his will that Rs 500 should be spent every year for the maintinance of h s tomb Is the dir ection valid?

[No]
B U Oct 1927

If therefore a testator leaves in his will a direction that a certain part of his property shall be utilised for the maintenance of his tomb, such a direction is void and of no effect

Though the dead have no rights the criminal law regards a libel upon the dead as a crime but that too *only* when its publication is in truth an attack upon the interests of *living* persons

How far are the wishes of a dead person given effect by law and in what manner?

B U Apr 1937

Moreover the law of succession permits the desires of the dead to regulate the actions of the living For many year after a man is dead, his hand may continue to regulate and determine the enjoyment of the property which he owned while living

PART VIII

THE LAW OF PROCEDURE

3 *Insufficient evidence* —that is to say one which does *not* amount to proof and raises no proof and raises no presumption, conclusive or conditional

4 *Exclusive evidence* —that is to say, facts which in respect of matter in issue possess any probative force at all

5 *No evidence* —that is to say, facts which are destitute of any evidential value

Kinds of presumptions

1 Conclusive and rebuttable

Legal presumptions are of *two* kinds mainly being either *conclusive* or *rebuttable* A presumption of the first kind *constrains* the courts to infer the existence of one fact from the existence of another, *even though* this inference *could* be proved *to be false* A presumption of the second kind requires the courts to draw such an inference even though there is no sufficient evidence to support it, provided only that there is no sufficient evidence to establish the *contrary* evidence

Comment briefly on 'Legal Presumptions'
B U Oct 1928
Apr 1930
1943

The principles of *res judicata* may serve as an illustration of the first kind A negotiable instrument is *presumed* to be given for value, a person not heard of for seven *years is presumed* to be *dead*, and an accused person is *presumed* to be *innocent* unless and until the contrary is proved, are illustrations of the second kind

2 Conditional

Presumptive or
to proof only
disproof It
contrary *proof*
contrary Tl
be innocent, a
given for value

proof is a fact which amounts
no *other* fact amounting to
bid until overthrown by
uable by evidence *to the*
once is presumed to
d to have been

Write a short critical note on 'Conditional presumptions'
B U Apr 1934
1937

3 C

Di this is
strength as *not* to
words, this fact
or non existence of
possess probative force to

such
other
may

3 Primary and Secondary

Define and discuss Primary evidence and Secondary evidence
B U Apr 1930 1937

Primary evidence is evidence viewed in comparison with any available and *less* immediate instrument of proof Secondary evidence is that which is compared with any available and *more immediate instrument of proof*

Thus primary evidence that A assaulted B is the judicial testimony of C that he *saw* the assault secondary evidence is the judicial testimony of D that C *told* him that he saw the assault Primary evidence of the contents of a written document is the production in court of the *document itself* secondary evidence is the production of a *copy* or *oral testimony* as to the contents of the original

4 Direct and circumstantial

Write a short critical note on Exclusive evidence'
B U Apr 1930

Direct evidence is testimony relating *immediately* to the principle fact All other evidence is circumstantial

The testimony of A that he saw B commit the offence charged constitutes direct evidence on the other hand the testimony of A that B was *seen* by him leaving the place of occurrence and having the instrument of the offence in his hand is merely *circumstantial* evidence

5 Exclusive

There is an important class of rules declaring certain facts to be *exclusive* evidence none *other* being admissible Thus a written contract can be proved in no *other* way than by the production of the *writing itself* whenever its production is possible

6 Insufficient

The law contains rules declaring that certain evidence is *insufficient* and that it is therefore, *not* permissible for the courts to *act* upon it An example is the rule of English law that in certain kinds of treason the testimony of *one* witness is insufficient

Rules for valuing evidence

—Law has made the estimation of probative force or the *weighing* of evidence a matter of inflexible rules These rules may be conveniently divided into *five* classes declaring respectively that certain facts amount to —

State the rules governing the probative value of evidence
B U Oct 1922 1924

1 *Conclusive proof*,—in other words one which raises a *conclusive* presumption

2 *Presumptive proof* —One which raises a *conditional* or *rebuttable* presumption

3 *Insufficient evidence* —that is to say one which does *not* amount to proof and raises no proof and raises no presumption, conclusive or conditional

4 *Exclusive evidence* —that is to say facts which in respect of matter in issue possess any probative force at all

5 *No evidence* —that is to say, facts which are destitute of any evidential value

Kinds of presumptions

1 Conclusive and rebuttable

Legal presumptions are of *two* kinds mainly being either *conclusive* or *rebuttable* A presumption of the first kind *constrains* the courts to infer the existence of one fact from the existence of another, *even though* this inference *could* be proved to be false A presumption of the second kind requires the courts to draw such an inference even though there is no sufficient evidence to support it, provided only that there is no sufficient evidence to establish the *contrary* evidence

Comment briefly on 'Legal Presumptions'
B U Oct 1928
Apr 1930
1943

The principles of *res judicata* may serve as an illustration of the first kind A negotiable instrument is *presumed* to be given for value a person not heard of for seven years is *presumed to be dead*, and an accused person is *presumed* to be *innocent*, unless and until the contrary is proved, are illustrations of the second kind

2 Conditional

Presumptive or conditional proof is a fact which amounts to proof only so long as there exists no *other* fact amounting to disproof It is a *provisional* proof, *valid until overthrown by contrary proof* The presumption is *rebuttable* by evidence *to the contrary* Thus, a person accused of any offence is presumed to be innocent, a negotiable instrument is presumed to have been given for value

Write a short critical note on 'Conditional presumptions'
B U Apr 1934
1937

3 Conclusive.

By this is meant a fact possessing probative force of such strength as *not* to admit of effective contradiction In other words this fact amounts to proof irrespective of the existence or non existence of any *other* facts whatsoever which may possess probative force to the *contrary* direction

APPENDIX

THE THEORY OF SOVEREIGNTY

THE THEORY OF SOVEREIGNTY

The theory in question is one of the *three* fundamental propositions to which Hobbes's theory of sovereignty may be reduced e g

1 that sovereign power is *essential* in every state

2 that sovereign power is *indivisible*,

3 that sovereign power is *unlimited* and *illimitable*

We have to consider the second proposition with reference to the English Constitution

Theory of Indivisible Sovereignty

In the first proposition it is laid down that sovereign power is *essential* in every state In the second, such sovereign power it is said, is *indivisible*, that is to say, it cannot be divided or shared It is vested in one person or one or two *bodies* of persons, and in the latter case all the persons necessarily possess it as *joint* tenants of the *whole* and not as tenants in *severalty* of different *parts*

Discuss the theory of indivisible sovereignty with reference of the English Constitution

B U Apr 1926

By applying this doctrine of Hobbes to the British constitution, we find that this constitution is a clear instance of *divided sovereignty* The *legislative sovereignty* resides in the Crown and the two Houses of Parliament, but the *executive sovereignty* resides in the Crown by itself the Houses of Parliament having *no* share in it In *practice* the House of Commons has obtained complete control over the Executive Government, but in *legal theory* the executive power of the Crown is *sovereign* being *absolute*, and *uncontrolled* within its own sphere It may be objected by the advocates of the theory that the executive is under the control of the legislature, and that the sum total of sovereign power is therefore vested in the *latter* and is *not divided* between it and the *executive* The reply is that the Crown is not merely itself a part of the legislature but a part without whose consent the legislature, cannot exercise *any* fragment of its own power How then can the legislature control the executive? A power over a person, which cannot be exercised without that person's consent is no power over him at all The English constitution, therefore, recognises a sovereign *executive* no less than a sovereign *legislature*

THE END